

# AUDITA QUERELA AND THE LIMITS OF FEDERAL NONRETROACTIVITY

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## INTRODUCTION

In January 2014, Deputy Attorney General James M. Cole called on the nation’s bar to assist the U.S. Department of Justice (DOJ) in identifying prisoners who might benefit from executive clemency.<sup>1</sup> Such individuals, Deputy Attorney General Cole ex-

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1. James M. Cole, U.S. Deputy Att’y Gen., Remarks at the Annual Meeting of the New York State Bar Association (Jan. 30, 2014), *available at* <http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>. The power of executive clemency is vested in the President. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to

plained, were sentenced under “older, stringent punishments that are out of line with sentences imposed under today’s laws.”<sup>2</sup> Deputy Attorney General Cole was referring in part to those sentences imposed pursuant to the then-mandatory U.S. Sentencing Guidelines.<sup>3</sup> The DOJ staked out a strong position in favor of fairness in sentencing in Deputy Attorney General Cole’s speech,<sup>4</sup> and the proposal found support among practitioners and the press.<sup>5</sup>

Nevertheless, Deputy Attorney General Cole’s project raises two important questions. The first is: why clemency? If sentencing has changed, and many prisoners sentenced under “older, stringent punishments”<sup>6</sup> would not have received such harsh sentences today, are they not serving “illegal” sentences? The second is: what about prisoners whose sentences were inequitable even at the time they were rendered? What, if anything, do changes in the law mean for them?

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grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

2. Cole, *supra* note 1.

3. 18 U.S.C. §§ 3551–59, 3571–74, 3581–86 (2012); 28 U.S.C. §§ 991–998 (2012); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (detailing the history of the Sentencing Reform Act of 1984).

4. Cole, *supra* note 1 (“[E]mbedded in this issue of [enforcing federal law fairly] is the consideration of sentence reductions for those who, at an earlier time, encountered severe and inflexible sentencing laws.”).

5. See, e.g., Editorial, *Mercy in the Justice System*, N.Y. TIMES, Feb. 10, 2014, at A20; Meredith Clark & Adam Serwer, *Effort Launched to Commute More Drug Sentences*, NAACP LEGAL DEF. & EDUC. FUND (Jan. 30, 2014), <http://www.naacpldf.org/news/effort-launched-commute-more-drug-sentence>. A network consisting of the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, Families Against Mandatory Minimums, and the American Bar Association has established Clemency Project 2014, which identifies and represents those prisoners who are possibly eligible under Deputy Attorney General Cole’s criteria in clemency applications. Press Release, Am. Civil Liberties Union, Clemency Project 2014 Receives More than 20,000 Prisoner Surveys (July 28, 2014), available at <https://www.aclu.org/criminal-law-reform/clemency-project-2014-receives-more-20000-prisoner-surveys>. The national Federal Defender network was slated to assist in the effort to lobby for more commutations under Deputy Attorney General Cole’s criteria, but the Administrative Office of the U.S. Courts barred them from assisting, on grounds that the Federal Defenders were only authorized to act as counsel in cases in which a right to counsel attached (i.e., trials and direct appeals). Memorandum from Judge John D. Bates, Dir., Admin. Office of the U.S. Courts, to Fed. Pub./Cmt. Defenders (July 31, 2014), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1239521/clemency-memo-dir14-063-08-01-14.pdf>.

6. Cole, *supra* note 1.

Prisoners have been raising the first question since at least 2005, when the Supreme Court decided the Federal Sentencing Guidelines could no longer be administered mandatorily without violating the Sixth Amendment.<sup>7</sup> For the bulk of these prisoners, the answer can be found in the federal nonretroactivity doctrine enunciated in *Teague v. Lane*,<sup>8</sup> and codified, to some extent, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>9</sup> Abrogating the long-held presumption in favor of the retroactive application of judicial decisions,<sup>10</sup> *Teague* largely prevents the retroactivity of any “new” rule of constitutional criminal procedure to cases on collateral review, with two narrowly crafted exceptions.<sup>11</sup> For reasons discussed at greater length in Part II.B–C, *Booker* is not retroactive; thus the majority of those prisoners who were sentenced before 2005, who are certainly serving sentences that would today be considered unconstitutional,<sup>12</sup> are generally denied relief

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7. *United States v. Booker*, 543 U.S. 220, 233 (2005) (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.”).

8. 489 U.S. 288, 305–10 (1989).

9. Pub. L. No. 104-132, 110 Stat. 1213 (codified in scattered sections of 28 U.S.C.). The relevant provisions, 28 U.S.C. §§ 2254(d)(1) and 2255(h)(2), apply a more stringent version of the nonretroactivity rule under some circumstances; in others, *Teague* remains in effect. *See* *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (“[The] AEDPA did not codify *Teague*, and . . . ‘the AEDPA and *Teague* inquiries are distinct.’”) (quoting *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam)); *Lee Kovarsky, AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 449 n.24 (2007) (“As a technical matter, *Teague* still exists [notwithstanding 28 U.S.C. § 2254(d)(1)], and it applies in retroactivity contexts that the stricter language of [the AEDPA] does not.”).

10. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 n.6 (1965) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)) (“Judicial decisions have had retrospective operation for near a thousand years.”); *see also* BEN JURATOWITCH, *RETROACTIVITY & THE COMMON LAW* 42 (2008) (“[T]he common law has traditionally been tolerant of the retroactive effects of judicial decisions developing or changing a common law rule.”).

11. 489 U.S. at 305–10. The two exceptions are: a new *substantive* rule, and “watershed” rules of criminal procedure that “require the observance of those procedures that . . . are implicit in the concept of ordered liberty.” *Id.* at 307, 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)) (internal quotation marks omitted).

12. *See, e.g., United States v. Garza*, 429 F.3d 165, 171 (5th Cir. 2005) (finding it to be reversible error that sentencing judge believed the Guidelines applied mandatorily).

because they cannot avail themselves of nonretroactive rules in statutory habeas proceedings.<sup>13</sup>

The second question is more difficult. If a prisoner's sentence had an equitable—rather than strictly legal—flaw at the time it was handed down, and a so-called “new” rule of constitutional criminal procedure would have prevented that flaw from occurring at the time, does she have any other option beyond statutory habeas? If so, would federal nonretroactivity doctrine bar such a claim?

The harm described in this second question—as a distinct harm, involving both equitable and legal claims—demands a more robust answer than clemency petitions.<sup>14</sup> However, the answer cannot be statutory or common law habeas, which is designed to challenge the validity of a conviction at the time it was rendered; nor can it be the common law writ of error coram nobis, which applies only to individuals who are no longer in custody.<sup>15</sup> As some prisoners have begun to recognize, the answer can be found in the depths of the common law, in the writ of audita querela.<sup>16</sup>

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13. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1213 (codified in scattered sections of 28 U.S.C.). This matter is discussed at greater length in Part II.

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle that every right, when withheld, must have a remedy, and every injury its proper redress.”).

15. For habeas' role in challenging the validity of a conviction where the petitioner remains in custody, see, for example, *Harlan v. McGourin*, which says that “jurisdiction under [the writ of habeas corpus] is confined to an examination of the record, with a view to determining whether the person restrained of his liberty is detained without authority of law” and towards whether the petitioner has suffered “a denial of right under the Federal Constitution.” 218 U.S. 442, 445, 447 (1910). For the role of coram nobis in challenging the validity of a conviction where the petitioner is no longer in custody, see *United States v. Morgan*, which found coram nobis was available to challenge the constitutional validity of a conviction for petitioners who did not meet the custodial requirement under 28 U.S.C. § 2255. 364 U.S. 502, 510–11 (1954); see also *Korematsu v. United States*, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984), *vacating* 323 U.S. 214 (1944) (vacating Fred Korematsu's conviction as unconstitutional, even though the petitioner was unable “to meet the ‘in custody’ requirements of § 2255 under any interpretation of that section”); David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1278–81 (2009) (discussing Fred Korematsu's petition and the competing visions of coram nobis it implicates). For an early, pre-*Morgan* discussion of coram nobis' possibilities, see Note, *Post-Release Attacks on Invalid Federal Convictions: Obstacles to Redress By Coram Nobis*, 63 YALE L.J. 115, 116–24 (1953).

16. See, e.g., *United States v. Loveless*, No. 4:95CR3054, 2010 WL 489534, at \*2 (D. Neb. Feb. 8, 2010) (denying petition for writ of audita querela following an extensive overview of the writ's history).

The writ of *audita querela*, legal Latin for “the complaint having been heard,”<sup>17</sup> is a unique remedy for a unique harm. Historically, and contrary to currently accepted conceptions of the writ in federal judgments reviewing its use, the writ allowed petitioners to concede the legal validity of a judgment at the time it was rendered, but challenge its continued execution due to inequities at the time of judgment in conjunction with matters that arose after the its rendition.<sup>18</sup> This obscure writ, which has only rarely been analyzed in depth,<sup>19</sup> has recently experienced a rebirth in federal postconviction litigation.<sup>20</sup> Its resurgence has been accompanied by a wealth of doctrinal and historical confusion,<sup>21</sup> and limited scholarly attention.<sup>22</sup>

The purpose of this Note is to explore the limits of nonretroactivity in light of the writ of *audita querela*,<sup>23</sup> specifically in the context of postconviction resentencing litigation. This Note concludes that *audita querela* renders judicial decisions such as *Booker*, other-

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17. BLACK'S LAW DICTIONARY 150 (9th ed. 2009).

18. See, e.g., *United States v. Torres*, 282 F.3d 1241, 1245 n.6 (10th Cir. 2002); *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991).

19. See THEODORE F.T. PLUCKNETT, *LEGISLATION OF EDWARD I* 140 (1949) (observing that the writ has been largely ignored by scholars).

20. See *infra* Figure 1.

21. Compare *Ejelonu v. I.N.S.*, 355 F.3d 539, 546–47 (6th Cir. 2004) (granting *audita querela* relief on grounds of equity alone), and *United States v. Fonseca-Martinez*, 36 F.3d 62, 65 (9th Cir. 1994) (raising, without deciding, the issue of whether *audita querela* afforded relief upon equity alone), with *United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir. 1995) (finding that “[a]udita querela is probably available where there is a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and that is not redressable pursuant to another post-conviction remedy”), and *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992) (“*Audita querela* is not a wand which may be waved over an otherwise valid criminal conviction, causing its disappearance. . . . The defense or discharge must be a legal defect in the conviction, or in the sentence which taints the conviction.”). See also *Doe v. I.N.S.*, 120 F.3d 200, 203 (9th Cir. 1997) (“At common law, *audita querela* was available only to relieve a judgment debtor where a legal defense or discharge arose subsequent to the judgment.”).

22. The Author is aware of only a handful of articles that discuss *audita querela* in modern federal court. See Ira P. Robbins, *The Revitalization of the Common-Law Civil Writ of Audita Querela as a Post-Conviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 GEO. IMMIGR. L.J. 643 (1992); see also Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 218–21 (2003).

23. The issue has been addressed most clearly in two federal district court opinions. See *Kessack v. United States*, No. C05-1825Z, 2008 WL 189679, at \*6 (W.D. Wash. Jan. 18, 2008) (finding the rule in *Teague* does not apply to petitions for *audita querela* relief); *United States v. Ayala*, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990) (finding that the rule in *Teague* applied to petitions for *audita querela* relief).

wise beyond habeas' reach under *Teague* and the AEPDA, available to petitioners under certain circumstances.<sup>24</sup> Three major factors support this conclusion: the writ's historical structure; the logic of the *Morgan* doctrine;<sup>25</sup> and the presumption against derogation of postconviction rights absent clear congressional authorization,<sup>26</sup> combined with the absence of such authorization in the AEDPA.<sup>27</sup> The reticence of the federal courts to afford this form of relief, discussed in the limited decisional law on the subject, centers upon confusion regarding the writ's historical background,<sup>28</sup> exaggerated separation of powers concerns,<sup>29</sup> and an overextension of *Teague*'s concerns regarding the finality of judgments.<sup>30</sup>

First, Part I will identify the major sources of controversy over *audita querela* in the courts today and subsequently delve into the writ's long and complex history to identify historically grounded

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24. Compare *Kessack*, 2008 WL 189679, at \*5 (finding that the rule in *Teague* opened up a gap in post-conviction remedies that *audita querela* could fill), with *Ayala*, 894 F.2d at 429 n.8 (“[A] defendant challenging his conviction collaterally may not style his motion as a petition for a writ of *audita querela* simply to evade the Supreme Court’s painstakingly formulated ‘retroactivity’ rules.”).

25. See *United States v. Morgan*, 346 U.S. 502, 506 (1954).

26. See, e.g., *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001) (“[A]s a general matter, when a particular interpretation of a statute invokes the outer limits of Congress’s power, we expect a clear indication that Congress intended that result.” (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

27. Notably, *audita querela* jurisdiction has been repealed elsewhere in the Code and *not* in the AEDPA. See, e.g., 8 U.S.C. § 1252(b)(9) (repealing federal jurisdiction over removal orders under 28 U.S.C. § 1651). See generally REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8, 18, and 49 U.S.C.).

28. Compare *Ejelonu v. I.N.S.*, 355 F.3d 539, 546–47 (6th Cir. 2004) (citing 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 593 (3d ed. 1922)) (finding support for a “pure equity” variant of *audita querela*), with *United States v. Reyes*, 945 F.2d 862, 866 (5th Cir. 1991) (finding there to be no “historical warrant” to authorize equitable relief through *audita querela*).

29. A clear example of this objection can be found in *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991) (establishing a requirement for a squarely *legal* objection to a petitioner’s conviction, and finding that such a requirement “respects the proper interest of the legislative branch in defining the beneficiaries of its laws and of the executive branch in maintaining the integrity of convictions lawfully obtained”).

30. See *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); *Holder*, 936 F.2d at 5 (quoting *United States v. Holder*, 741 F. Supp. 27, 30 (D.P.R. 1990) (“[T]he government’s interest in maintaining a criminal record, including the general deterrent effects of the consequences of a criminal record, and the efficient enforcement of the immigration laws, outweighs the petitioner’s interest in circumventing the legal requirements for permanent legal resident status.”)).

resolutions. Because there is so much confusion as to what the writ even *is*, it is essential that future decisions take into account a comprehensive and accurate depiction of the writ as it existed at its origins.<sup>31</sup> This historical analysis will reveal a writ that functioned as an *equitable vehicle* to air *legal objections* to the *continued execution* of a judgment.<sup>32</sup> This quasi-equitable, quasi-legal model differs from most depictions of the writ in the decisional law today, which conceives it as either “purely” equitable or legal in scope.<sup>33</sup> The historical truth is more complex.

After exploring the writ’s background, Part II will proceed to discuss the animating doctrine supporting the use of the writ today. This Part necessarily begins with a discussion of the seminal case affording postconviction relief ancillary to habeas,<sup>34</sup> and subsequently envisions the writ’s proper use in federal court.<sup>35</sup> Following an assessment of the relevant objections, this Note concludes that, absent a clear finding by the Court or Congress to the contrary, the nonretroactivity rule announced in *Teague* cannot control petitions for audita querela because of its history, its structure, and the doctrine of completion enunciated in *Morgan*.

## I. HISTORY

Prisoners have sought relief under audita querela at increasingly greater rates since 1990.<sup>36</sup> During this time, the courts have expressed significant concern over what purpose the writ has served

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31. See *Ejelonu*, 355 F.3d at 546–47 (discussing the extent to which a deciding court must rely on depictions of the writ’s historical background). Indeed, the way a court frames the writ’s history can be a decisive factor in its decision. See *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992).

32. See, e.g., *Lamson v. Bradley*, 42 Vt. 165, 170–71 (1869) (“It is not the office of the writ of *audita querela* to correct errors in the judgment.”).

33. This blurry line between equitable and legal jurisdiction is not unique to audita querela in the post-conviction context. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (discussing the role of “equitable principles” in “defin[ing] the court’s discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence”).

34. *United States v. Morgan*, 346 U.S. 502, 510 (1954).

35. The discussion in Part II to some extent relies on the most compelling examples that have circulated through the lower federal courts. See, e.g., *Kessack v. United States*, No. C05-1825Z, 2008 WL 189679, at \*5 (W.D. Wash. Jan. 18, 2008); *United States v. Ghebzeiabher*, 701 F. Supp. 115, 117 (E.D. La. 1988); *United States v. Salgado*, 692 F. Supp. 1265, 1269 (E.D. Wash. 1988).

36. See *infra* Figure 1.

historically,<sup>37</sup> and whether the writ is “purely legal” or “purely equitable.”<sup>38</sup> These two concerns rest at the writ’s very foundations: without an adequate historical answer to these concerns, the writ will remain “shrouded in ancient lore and mystery”<sup>39</sup> and do little to serve those whom it would most benefit.

With respect to the historical purpose of the writ, many of the contemporary commentaries and judicial decisions have overlooked the important role of incarceration and mandatory execution of judgment to *audita querela*’s development.<sup>40</sup> The writ was designed by medieval common lawyers to overcome roughly analogous problems as those presented by post-*Booker* litigation today: unjust and inequitable confinement, and nondiscretionary terms of custody mandated by statute.

As for the complex question of *audita querela* sounding in law or equity, the history—both overseas and in the United States—paints a picture of a vehicle that allowed petitioners whose judgment was infected by some equitable infirmity to raise otherwise unavailable legal claims.<sup>41</sup> This nuance has been considered by few courts, and recognized by even fewer.<sup>42</sup> Bearing these factors in mind, this Part will first discuss the English origins of the writ, which will expose both the carceral origins of the writ and the nucleus of its legal and equitable nature. It will then discuss the writ in America before 1990, which will shed light on how American courts carried over the English courts’ concerns and assumptions regarding the writ.

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37. See *Villafranco v. United States*, No. 2:05-CV-368BSJ, 2006 WL 1049114, at \*2, \*9–11 (D. Utah Apr. 18, 2006).

38. Compare *United States v. Richter*, 510 F.3d 103, 104 (2d Cir. 2007) (finding the writ can only give rise to legal claims), with *Ejelonu v. I.N.S.*, 355 F.3d 539, 546–47 (6th Cir. 2004) (granting *audita querela* relief on grounds of equity alone), and *Kessack*, 2008 WL 189679, at \*6 (finding the writ gives rise to a legal claim following a showing of equitable harm).

39. FED. R. CIV. P. 60 advisory committee’s note.

40. Robbins, *supra* note 22, at 684 (concluding that *audita querela* can only lie where “the petitioner has served his or her sentence and been released from custody”).

41. *Lamson v. Bradley*, 42 Vt. 165, 170 (1869) (finding mere legal error insufficient, without “harm,” for the writ to lie); *Skills v. Coolidge*, 14 Mass. (13 Tyng) 43, 48 (1817) (finding that if the execution was against the manifest intent of those rendering judgment, the writ lies).

42. See *Kessack*, 2008 WL 189679, at \*5.

A. *Origins at Common Law: Incarceration, Law, and Equity*

The earliest iterations of the writ *audita querela* depict a common law remedy fashioned as a response to applications of early statutory law beginning under King Edward III in 1336.<sup>43</sup> While Professor Robbins addressed this period in the early 1990s,<sup>44</sup> previous discussions could not have anticipated the role historical disputes would play in *audita querela* litigation in the years that followed.<sup>45</sup> Accordingly, brief historical analysis is of great importance: if the trend in *audita querela* litigation in the United States is historically based, it ought to at least to rest on sound foundations.

1. Context

*Audita querela* developed as a means of liberating inequitably incarcerated debtors in medieval England. A review of the primary documents and interpretive scholarship shows that the writ was the common law's response to a penal crisis generated by a series of Acts of Parliament between 1283, under the reign of Edward I,<sup>46</sup> and 1353, under Edward III.<sup>47</sup> These statutes, which would appear to us today as crude bankruptcy proceedings, were Parliament's ill-considered response to persuade continental Europe's nascent merchant class to settle their capital on England's shores.<sup>48</sup> Understanding these statutes will help to resolve some of the historical disputes that underlie the debate regarding the writ's structure, and ultimately the question of the proper application of federal nonretroactivity doctrine to the writ today.

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43. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 393–94 (5th ed. 1956).

44. See Robbins, *supra* note 22, at 646–48.

45. For a particularly strong example of the role of history in *audita querela* litigation, see *Villafranco v. United States*, No. 2:05-CV-368BSJ, 2006 WL 1049114, at \*1–2, \*9–11 (D. Utah Apr. 18, 2006).

46. See Statute of Acton Burnell, 1283, 11 Edw. 1, *reprinted in* 1 STATUTES OF THE REALM 53, 98 (1810–28); Statute of Merchants, 1285, 13 Edw. 1, *reprinted in* 1 STATUTES OF THE REALM, *supra*.

47. Statute of the Staple, 1353, 27 Edw. 3, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 46, at 332.

48. See, e.g., Statute of Acton Burnell, 1283, 11 Edw. 1, pmbl. (“Forasmuch as Merchants, which heretofore have lent their Goods to divers persons, be greatly impoverished, because there is no speedy Law provided for them to have Recovery of their Debts at the Day of Payment assigned; and by reason hereof many Merchants have withdrawn to come to this Realm with their Merchandises, to the Damage as well of the Merchants, as of the whole Realm: The King by himself and by his Council hath ordained and established [the debt-collection procedure outlined in the Statute].”).

Under the reign of Edward I in the thirteenth century, feudalism, long the governing economic model in England, was facing increasing pressure from the rising merchant class on the Continent,<sup>49</sup> and the monarch and his Parliament were interested in retaining foreign capital within the English kingdom.<sup>50</sup> Indeed, medieval commerce developed in large part because of the extension of export trade.<sup>51</sup> This merchant class relied on massive trade routes that were time-sensitive and necessitated round-trips to their suppliers and home countries.<sup>52</sup> Further, the circuitous nature of their business necessitated the use of debt instruments; the merchant class could not avail themselves of English markets without assurances that their local lines of credit were collectable and collectable quickly.<sup>53</sup> However, the feudal common law was simply ill-equipped to enable foreign merchants, who had neither time nor inclination to sue out a writ of debt and *venire facias*,<sup>54</sup> particularly when sheriffs might favor local debtors over foreign creditors.<sup>55</sup>

As Plucknett puts it, merchants “desired to obtain the benefits of a judgment without the hazards and delays of a long process; particularly, lenders wished to have judgment entered at the moment the loan was contracted.”<sup>56</sup> To that end, in the thirteenth century, prudent creditors initially used “debts of record,” which consisted of a sealed recognizance enrolled in a court, which “operated immediately as a charge upon the debtor’s lands,” without the inconvenience of contentious litigation.<sup>57</sup> There remained inefficiencies to this older model of debt collection, in that it set limits

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49. PLUCKNETT, *supra* note 19, at 136.

50. Statute of Acton Burnell, 1283, 11 Edw. 1, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 46.

51. HENRI PIRENNE, ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE 140 (1937).

52. 2 FERNAND BRAUDEL, CIVILIZATION AND CAPITALISM 140–42 (Siân Reynolds, trans., Univ. of Cal. Press 1992) (1979).

53. E.K. HUNT, PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES 18–19 (7th ed. 2003).

54. *Id.* at 18; DAVID KENNETT, A NEW VIEW OF COMPARATIVE ECONOMICS 49 (2d ed. 2004) (“Commercial activity as we know it today was largely incompatible with feudalism.”); PLUCKNETT, *supra* note 19, at 137 (“Possibilities of conflict between commerce and feudalism multiplied when the merchant appeared as a litigant in the law courts.”).

55. PLUCKNETT, *supra* note 19, at 137.

56. PLUCKNETT, *supra* note 43, at 391.

57. *Id.* at 392.

on how much of the debtor's property could be seized on default, and it left the debtor at liberty.<sup>58</sup>

Enter, then, the Statute of Acton Burnell and its progeny.<sup>59</sup> These statutes were expressly designed to expedite the debt collection process—to make English commercial law “more adapted to the nature of mercantile transactions, for ease and dispatch, than the process of law”<sup>60</sup>—and ensure that the debtor be incarcerated upon execution of the statute.<sup>61</sup> That is to say, the statute guaranteed payment to the merchant far more rapidly than debt recovery in the common law courts. It was in answer to these statutes that *audita querela* was invented as a remedy for imprisoned debtors.

The first iteration of these “statutes merchant” was the Statute of Acton Burnell.<sup>62</sup> It provided that a recognizance, sealed with the debtor's and the mayor's seals, be enrolled with the clerk of court.<sup>63</sup> Upon default, the mayor ordered the sale of the debtor's chattels and lands, *in their entirety*; if no such property was available within the mayor's jurisdiction, the debtor was to be imprisoned until the balance was paid.<sup>64</sup> Within several years, defects in the statute became apparent.<sup>65</sup> This second iteration of the statute, meant to resolve inadequacies of enforcement of the original Statute of Acton Burnell, gave rise to a grave penal crisis that necessitated the creation of the writ of error *audita querela*.

The Statute of Merchants carried the same formal requirements on the recognizance, but reversed procedure and vastly en-

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58. Though debts of record were more efficient than suing out a writ of debt, in some cases a jury nevertheless had to be assembled to value the property, the lender had to sue out a writ on default, and often one could not imprison a debtor under pre-Burnell provisions. *See id.* at 389–92.

59. *See supra* notes 46–47.

60. 2 JOHN REEVES, *REEVE'S HISTORY OF THE ENGLISH LAW* 277–79 (1869) (discussing the third iteration of the Statute of Acton Burnell, the Statute of the Staple, which functioned almost identically to previous forms but addressed a different set of market actors).

61. PLUCKNETT, *supra* note 19, at 138 (“It is to [the] primary problem of debt-collecting that Edward I's statutes were directed.”).

62. Statute of Acton Burnell, 1283, 11 Edw. 1, *reprinted in* 1 *STATUTES OF THE REALM*, *supra* note 46.

63. *Id.*

64. *Id.*

65. *See* PLUCKNETT, *supra* note 19, at 136–61. Apparently, sheriffs would sometimes refuse to enforce these harsh securities in favor of foreign creditors as against domestic borrowers. Statute of Merchants, 1285, 13 Edw. 1, *reprinted in* 1 *STATUTES OF THE REALM*, *supra* note 46 (“Sheriffs misinterpreted his statutes, and sometimes by Malice and false Interpretation delayed the execution of the Statute, to the great damage of Merchants.”).

hanced penalties.<sup>66</sup> Under Acton Burnell, one could only incarcerate the debtor if he had no property to seize, and the gaoler could, at least theoretically, decline to imprison him.<sup>67</sup> Under the new version of the law, imprisonment *happened automatically* upon execution of the judgment.<sup>68</sup> To ensure the gaoler would not shirk his statutory responsibility, if he refused to jail the debtor, he himself—or, failing him, the owner of the gaol—would be liable for the balance.<sup>69</sup> During the first three months of imprisonment, the debtor could pay off the balance with his own payment or sales, but thereafter his property was delivered to the creditor.<sup>70</sup> There was no escape for the debtor, and no defense could be raised because the judgment had already been rendered: there was, quite simply, nothing to contest.

This rudimentary debt collection apparatus, while facially efficient and effective, was nevertheless subject to abuse. Not only had the Statute failed to contemplate the legal effect of a debtor defaulting on lines of credit from multiple lenders,<sup>71</sup> or the Statute's impact on assignees,<sup>72</sup> but also, as Professor Plucknett observes, "the resources of mediaeval fraud and forgery were considerable," and merchants and others had the capacity to enroll a false recogni-

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66. Statute of Merchants, 1285, 13 Edw. 1, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 46.

67. *See* PLUCKNETT, *supra* note 19, at 136–61.

68. Statute of Merchants, 1285, 13 Edw. 1, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 46.

69. *Id.* ("If the Keeper [shall not] receive [the debtor], he shall be answerable for the debt, if he have whereof; and if he have not whereof, he that committed the Prison to his keeping shall answer."). *See* Anon. v. Anon., Y.B. 14 Edw. 2, Eyre of London (1321) (Eng.), *reprinted in* 86 SELDEN SOCIETY 324 (1969). During the relevant period, the mayor of a city would appoint a private gaoler. If the gaoler was unable to pay the balance, the creditor could sue the mayor who had appointed him, even if the gaoler was not removable at the mayor's will. *Glasnyeth v. Beynyn*, Y.B. 5 Edw. 2, Mich., pl. 5 (1311) (Eng.), *reprinted in* 63 SELDEN SOCIETY 9 (1944). Put another way, the merchant was to have his money, even if it meant from the pocket of the governmental leadership.

70. The Statute of Merchants also had the effect of overcoming the common law's deeply rooted "immunity of freehold land" by essentially creating a new form of estate, passed "into the profane hands of the merchant." *See* PLUCKNETT, *supra* note 19, at 141. This "most daring innovation," however, warrants no further analysis for the purposes of this Note. *Id.*

71. *Id.* at 146.

72. This question was ultimately decided against assignees, who were found to be bound to execution of judgment against their assignors, in a case testing the limits of *audita querela*. *Somery v. Teukesbury*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 362 (Luke Owen Pike ed. & trans., 1901).

zance resulting in the nearly immediate impoverishment and jailing of the “debtor.”<sup>73</sup> Indeed, the legal atmosphere got worse for debtors subject to seizure by the Statutes around the time *audita querela* came into being, under Edward III, since “there [was] a noticeable tendency to read statutes more strictly.”<sup>74</sup> Courts had become less interested in creating new forms of relief, and more interested in enforcing statutory law to its letter.<sup>75</sup>

## 2. Cognizable Claims

During argument regarding the Statute Merchant in a 1344 case, counsel noted that *audita querela* had been devised in the tenth year of Edward III’s reign “on account of the mischief” arising from the Statute Merchant.<sup>76</sup> But what does this mean? What was the “mischief” the writ was meant to solve? This question is especially salient today, as litigants seek modern analogues in America’s criminal justice system.

Justice Baukwell, of the King’s Bench, stated the central problem concisely: “*without answer*, one may be ousted from his land by execution on statute merchant.”<sup>77</sup> Indeed, not only was the recognizer—the debtor—“ousted from his land,” but he was imprisoned instantly upon execution, and was deprived of any opportunity to answer because the judgment *was rendered upon enrolment of the recognizance*.<sup>78</sup> “No provision therefore was made for pleadings or defences by the debtor.”<sup>79</sup> Indeed, that was the whole point of the statute; the merchants desired expeditious debt collection, and allowing the judgment debtor any opportunity to contest the validity of the claim lengthened proceedings.<sup>80</sup> Judgment, and consequently incarceration, was instantaneous, nonlitigious, and nondiscretionary.

However, the common law did not back down so easily to this rising commercial statutory law. In spite of a growing tendency to interpret statutes strictly and close the doors to creative common

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73. PLUCKNETT, *supra* note 43, at 393.

74. THEODORE F.T. PLUCKNETT, *STATUTES & THEIR INTERPRETATION IN THE FOURTEENTH CENTURY* 87 (1922).

75. *Id.* at 121.

76. *Cestre v. Anon.*, Y.B. 18 Edw. 3, Trin., pl. 17 (1344) (Eng.), *reprinted in* 11 *YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD* 306 (Luke Owen Pike ed. & trans., 1904).

77. *Id.* at 308 (emphasis added).

78. *Id.*

79. PLUCKNETT, *supra* note 43, at 393.

80. PLUCKNETT, *supra* note 19, at 146.

lawyering,<sup>81</sup> debtors and their advocates contrived a way to answer the increasing prevalence of creditors forging recognizances,<sup>82</sup> creditors demanding execution of recognizances that had been acquitted,<sup>83</sup> creditors forcing individuals to enter into recognizances under duress,<sup>84</sup> and instances of “impersonation, collusion, as well as the occasional difficulties which arise when a statute has to be applied to situations which the legislature had not foreseen.”<sup>85</sup> In this capacity, the Statute Merchant enabled judgment debtors to raise defenses that would have been available if, for example, the creditor had sued out a writ of debt.<sup>86</sup> Because the judgment had already been rendered “the moment the loan was contracted,” these defenses were not available in any traditional way; the judgment had already been made. And so *audita querela* was born, and

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81. PLUCKNETT, *supra* note 74.

82. *Anon. v. Anon.*, Y.B. 20 Edw. 3, Hil., pl. 26 (1346) (Eng.), *reprinted in* 14 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 92, 94 (Luke Owen Pike ed. & trans., 1908) (“And it has often been seen in this Court that, where a party had paid the money, and the statute had been cancelled in lieu of acquittance, and the other party had afterwards sued execution upon a false and feigned statute, the person who was aggrieved was afterwards aided by such a writ [of *audita querela*].”); *see also* *Somery v. Teukesbury*, Y.B. 15 Edw. 3, Mich., pl. 14 (1341) (Eng.), *reprinted in* 6 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 310 (Luke Owen Pike ed. & trans., 1891).

83. *See, e.g.*, *Anon. v. Anon.*, Y.B. 17 Edw. 3, Hil., pl. 11 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 38, 40 (issuing the writ after the debtor produced evidence that he had already paid the debt and granting writs of *venire facias* and *supersedeas* “because of the mischief that the party would, in the mean time [awaiting trial on the issue], be imprisoned, and out of his land by execution”).

84. *Muleward v. Barbour*, Y.B. 15 Edw. 3, Trin., pl. 6 (1341) (Eng.), *reprinted in* 6 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 82, at 178 (“We tell you that Richard himself and others took us, &c., and led us to B. (and he assigned a different place from that of the date in the deed), and detained us there, and by menace and fear of death compelled us to execute that deed against our inclination and good will.”).

85. PLUCKNETT, *supra* note 19, at 146; *see also* *Somery v. Teuksbury*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72 (finding that assignees of recognizers under the Statutes could be disposed on execution); *Anon. v. Anon.*, Y.B. 13 Edw. 3, Mich., pl. 77 (1339) (Eng.), *reprinted in* 3 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 174 (Luke Owen Pike ed. & trans., 1886) (determining whether execution under the Statute of Merchants was available to an executor of an executor); *Goldington v. Bassingbourne*, Y.B. 5 Edw. 2, Hil., pl. 10 (1311), *reprinted in* 31 SELDEN SOCIETY 42 (1915) (alleging conspiracy on the part of creditors by the wronged debtors to “wrongfully [procure] to be made a statute merchant” in a pre-*audita querela* case; because the judgment had already been made, however, all petitioners could do was seek damages).

86. PLUCKNETT, *supra* note 43, at 391.

“the statute’s policy of eliminating litigation had completely failed.”<sup>87</sup>

### 3. Law and Equity

The foregoing analysis has sketched the impetus behind *audita querela* and has outlined the most rudimentary claims that could be raised: fraud, deceit, duress, and the like. It also seems apparent from the earliest cases that *audita querela* allowed judgment debtors to test the statute’s limits.<sup>88</sup> For example, just how far down the line of assignees could it reach? Could executors of the original executor recover on a Statute Merchant? The former set of claims seems clearly *legal*—actions for deceit and duress were available at medieval tort.<sup>89</sup> But the latter claims have a more “equitable” bent—they question the applicability of the statute *to the party*, based on their particular circumstances.

The question of whether *audita querela*, in its ancient form, was legal or equitable in nature has generated sharply divided opinions among those few scholars who have investigated the question. Professor Plucknett was decisively of the mind that *audita querela* was a remedy *at law*—only legal claims could be couched in its perimeters.<sup>90</sup> He dismisses Justice Stonore’s comment in an early case that “I tell you plainly that *Audita Querela* is given rather by Equity than by Common Law,”<sup>91</sup> as merely indicating that it required equity to hear the suit at all (given that judgment was rendered already), but that it only “allowed the debtor to plead common law

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87. PLUCKNETT, *supra* note 19, at 146.

88. *See supra* Part I.A.2.

89. *See* PLUCKNETT, *supra* note 43, at 640–43.

90. PLUCKNETT, *supra* note 43, at 394.

91. *Somery v. Teuksbury*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 370. While this quotation from Justice Stonore has generated much discussion, the case itself has not been explained clearly in the literature. *See, e.g.*, 2 HOLDSWORTH, *supra* note 28; PLUCKNETT, *supra* note 43, at 394; Robbins, *supra* note 22, at 648. The case concerned the rights of a tenant, John de Chevereston, of a recognizor, John Somery, whose *audita querela* claim had failed. The subtenant then sued an *audita querela* himself, and the threshold question was whether the failure of a recognizor’s *audita querela* petition thus barred a tenant’s. It is in the context of this question that Justice Stonore pronounced, “His suit ought to have discharged you, had it been in accordance with the truth, and ought also on the other hand to be prejudicial to you, if it was otherwise, since you claim through him; and I tell you plainly that *Audita Querela* is given rather by Equity than by Common Law, for quite recently there was no such suit, and possibly the suit is given only to the first.” *Somery*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 370.

defenses” otherwise unavailable by operation of statute.<sup>92</sup> Procedurally, this notion seems credible: a successful litigant at *audita querela* often did not obtain immediate relief; he had first to call a jury and have the dispute resolved with respect to his claim.<sup>93</sup>

At the other end of the spectrum sits Sir Holdsworth, whose scholarship maintained that *audita querela* was a fundamentally equitable remedy from the beginning, quite removed from the stiff operation of the common law.<sup>94</sup> His understanding of the writ’s operation is, simply, “after stating that the complaint ‘has been heard,’ it directed the court to hear both parties and to do justice to them.”<sup>95</sup> One case supporting Sir Holdsworth’s position was decided under the reign of Edward II, before *audita querela* became available. The case presents a familiar fact pattern: an incarcerated judgment debtor challenges execution of a judgment under the Statute, claiming to have satisfied the debt.<sup>96</sup> Finding that he could not rule definitively whether “he had another debt owing to him under the statute,” Chief Justice Bereford proclaimed, “seek your remedy in Chancery,” the court of equity.<sup>97</sup> Nowhere in the case is any particularly *legal* claim made, besides the hard conscience of the creditor.

As this Note’s readings of the cases described in Part I.A.3 suggest, Professor Plucknett and Sir Holdsworth, at least with regard to the writ’s operation in the fourteenth century, were both right: the writ couched both legal claims (such as “deceit”) *as well* as equitable ones (whether application of the law to the litigant was fair). This should not be altogether surprising, since, in the fourteenth century, “equity was not strictly separated from law, but both were administered together by the same court which enjoyed a very wide discretion.”<sup>98</sup>

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92. PLUCKNETT, *supra* note 43, at 394.

93. *See, e.g.*, Anon. v. Anon., Y.B. 20 Edw. 3, Hil., pl. 26 (1346) (Eng.), *reprinted in* 14 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 82, at 92 (“And upon this writ [*audita querela*] a *Venire facias* [to summon a jury] was prayed against the party.”).

94. 2 HOLDSWORTH, *supra* note 28, at 344 (writing that principles of “conscience” “were to some extent recognized by the invention, early in [the reign of Edward III] of the writ of *audita querela*”).

95. 1 HOLDSWORTH, *supra* note 28, at 224.

96. Anon. v. Anon, Y.B. 7 Edw. 2, Hil., pl. 21 (1313) (Eng.), *reprinted in* 39 SELDEN SOCIETY 76 (1922).

97. *Id.*

98. PLUCKNETT, *supra* note 74, at 121.

The case *Stifrewas v. Wedone* is instructive with regard to the breadth of this discretion.<sup>99</sup> Stifrewas and four others made recognition by the statute to a certain Wedone, who obtained execution.<sup>100</sup> Stifrewas was consequently incarcerated, and sued out a writ of audita querela alleging that satisfaction of the debt had been made.<sup>101</sup> After reaching the merits, the court issued the writ, enabling Stifrewas to summon a jury.<sup>102</sup> However, on request by counsel for *mainprise*, a form of bail, Justice Hillary refused: “you shall not have it; for the party complaining is in custody, and it is fit that he should be . . . for he is taken by virtue of the Statute Merchant, and it is expressed in the statute that the body shall remain until satisfaction be made for the debt.”<sup>103</sup> All this, in spite of the fact that the petitioner was likely wrongfully imprisoned, and “will never, as long as he is in custody, succeed in causing jurors to come from so distant a county.”<sup>104</sup> Indeed, the equities would seem to favor Stifrewas. Professor Plucknett attributes Justice Hillary’s “obdurate” refusal as indicative of the court’s tendency toward legalistic, mechanical application of statutory law under Edward III.<sup>105</sup>

However, the reporter notes following the Justice’s severe decision that in the previous year, in three different terms of court, “others in a similar case were let out on mainprise.”<sup>106</sup> Courts, apparently, were capable of a wide range of action on writs of audita querela, with respect to bail pending further proceedings and the types of claims that could be heard. While Professor Plucknett is undoubtedly right that “equity” enabled litigants to be heard at all,<sup>107</sup> it does not follow that only legal claims and legal considerations were available to litigants once in the door. Neither is it strictly correct, as Holdsworth would have it, that the writ was in all respects equitable;<sup>108</sup> legal claims, requiring the disposition of a jury, were also cognizable.

As the writ settled its roots in the English common law, however, its “equitable” components apparently dominated. For example, in the sixteenth century, Lord Chancellor Puckering made it a

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99. Y.B. 15 Edw. 3, Pasch., pl. 15 (1341) (Eng.), reprinted in 6 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 82, at 44.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. PLUCKNETT, *supra* note 74, at 125.

106. *Id.*

107. PLUCKNETT, *supra* note 43, at 394.

108. 2 HOLDSWORTH, *supra* note 28.

matter of course that law courts obtain his leave at Chancery before issuing writs of *audita querela*,<sup>109</sup> and the seventeenth century case that established equity's power over common law found *audita querela* to be a "Latin Bill in Equity,"<sup>110</sup> which enables equity, though a judgment may be "upon record," to "frustrate and set aside [a judgment], not for any error or Defect in the Judgment, but for the hard Conscience of the party," and that "judges [at law] also play the Chancellors" in this regard.<sup>111</sup>

All of this tends to show that *audita querela*, as this Note approaches the early American cases on the matter, matured into a vehicle through which litigants could challenge the execution of a judgment, even if it was correctly rendered. In its earliest form, it couched legal defenses a judgment debtor was unable to raise due to the instantaneous effect judgment under the Statute of Merchants; even then, however, it could be used to challenge the statute's application to the litigant as not being the type of individual envisioned by Parliament.<sup>112</sup> In its later forms, it was a method of raising equitable challenges, even in law courts.<sup>113</sup>

#### B. *American Audita Querela Pre-Booker*

The writ made its way from England to the United States, and retained a number of its original characteristics,<sup>114</sup> yet, in the words of Massachusetts Supreme Judicial Court's Justice Dewey in 1842, there was "comparatively [ ] little learning on the subject . . . [and] but few modern decisions on the appropriate office of [the]

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109. 5 HOLDSWORTH, *supra* note 28, at 230.

110. Earl of Oxford's Case, (1615) 21 Eng. Rep. 485 (Ch.) 487; 1 Ch. Rep. 1, 9.

111. *Id.*

112. Somery v. Teukesbury, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 386.

113. *Earl of Oxford's Case*, 21 Eng. Rep. at 487. *See also* Anon. v. Anon., Y.B. 11 Hen. 8, Mich., pl. 22 (1520) (Eng.), *reprinted in* 120 SELDEN SOCIETY 41 (2003) (denying a writ of *audita querela* in the King's Bench, not because the law court could not hear the claim, but because the equities did not favor the petitioners, convicted conspirators who had been mistakenly released by a bailiff and who were subsequently retaken).

114. Robbins, *supra* note 22, at 649 (discussing the fact that, "as was true in England, even though it was an independent action, *audita querela* had to be brought in the trial court that rendered the original judgment"). *See* Jones v. Watts, 142 F.2d 575, 576 (5th Cir. 1944) ("An ancient remedy in courts of law was by *audita querela* in the court which rendered the judgment, and without limit of time."); Gleason v. Peck, 12 Vt. 56, 58-59 (1840) (stating *audita querela* "must always be to the court having the record").

writ.”<sup>115</sup> Accordingly, the following discussion seeks to string together common threads and distinguish points of departure, while bearing in mind that the writ was not especially formalized during this period.

### 1. Substantive Functions

In the writ’s first uses in the United States, there are present many of the same fundamental concerns as were observed in Part I on *audita querela*’s origins at English common law: primarily the ability to challenge the continued execution of a judgment of debt against a debtor who had already paid the debt in question.<sup>116</sup> However, even during this early phase of its American development, courts defined the writ broadly:

An *audita querela*, is a writ which is granted . . . upon a complaint made by a debtor in execution, alleging some good cause wherefore he ought to be discharged from an execution, which he has had no day in court to plead or avail himself of; and praying to be liberated from the execution, and that the creditor may be cited before the court, to answer to his complaint.<sup>117</sup>

Note the expansive language, “some good cause,” and the emphasis on the debtor’s deprivation of a “day in court”; in this manner, and for these reasons, this Note has observed an *audita querela* function as early as the fourteenth century.<sup>118</sup> This classical use—by a debtor against a creditor to cease execution of judgment already satisfied—is that most reflected by the case law during this period.<sup>119</sup>

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115. *Coffin v. Ewer*, 46 Mass. (5 Met.) 228, 230 (1842).

116. *See, e.g.*, *Gridley v. Harrington*, 14 Mass. 497, 498 (1780) (acknowledging the technical validity of execution against debtor despite the fact that the money had already been paid to a trustee of the creditor, but staying execution to permit debtor to “apply for an *audita querela*, to seek a remedy from an execution, which it appears irregularly issued”).

117. *Woodbridge v. Winthrop*, 1 Root 557, 575 (Conn. 1793). *See also Coffin*, 46 Mass. (5 Met.) at 232 (stating the writ’s “leading purposes are to set aside and annul a judgment improperly obtained through the fraud and deceit of the creditor; or where the debtor had no opportunity to interpose matter relied on in avoidance; or where an execution has been issued, and the object is to release a party from an illegal imprisonment on such execution”).

118. *Cestre v. Anon.*, Y.B. 18 Edw. 3, Trin., pl. 17 (1344) (Eng.), *reprinted in* 11 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 76.

119. *See, e.g.*, *Humphreys v. Leggett*, 50 U.S. (9 How.) 297, 313 (1850) (granting the writ where “the surety had been compelled to pay the whole amount of his bond by process from the State courts, before the present defendants obtained their judgment against him, but after the institution of their suit”); *Lovejoy v. Web-*

Besides the classical formula described above, the writ was available under other circumstances less conformable to its primordial iterations before the King's Bench. For example, the writ could issue where the debtor was given no notice of the suit of debt;<sup>120</sup> it was made available by some courts to remedy the error of a trial court to deny an appeal;<sup>121</sup> it could be used to challenge a judgment for lack of jurisdiction;<sup>122</sup> and it was appropriate to challenge the validity of a judgment where an infant or incompetent was unrepresented at trial.<sup>123</sup> In one case, the writ was available to effectuate an annulment of debt where a statute previously available for the purpose had been declared unconstitutional as a violation of the Contract Clause.<sup>124</sup> New York passed a law in 1811 which "not [only] liberate[d] the person of the debtor, but discharge[d] him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes."<sup>125</sup> The Supreme Court found the portion of this law that discharged the debtor of liability to be a law "impairing" contracts, in violation of the Contract Clause,<sup>126</sup> but left alone that portion of the law that released the debtor from prison.<sup>127</sup> Within the year, a debtor petitioned for a writ of *audita querela* seeking the same remedy

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ber, 10 Mass. 101, 104 (1813) (stating *audita querela* lies "where a man satisfies a judgment and is taken in execution"); *Bryant v. Johnson*, 24 Me. 304, 306 (1844) (same); *Dodge v. Hubbell*, 1 Vt. 491, 496 (1829) (same).

120. *See, e.g.*, *Harmon v. Martin*, 52 Vt. 255, 257 (1880) (finding *audita querela* lies where debtor is deprived of notice of suit); *Stone v. Seaver*, 5 Vt. 549, 555-56 (1833) (finding that deprivation of notice is in itself sufficient for the writ to lie, even without allegation of fraud); *Marivn v. Wilkins*, 1 Aik. 107, 110 (Vt. 1826) (same).

121. *See, e.g.*, *Tyler v. Lathrop*, 5 Vt. 170, 171 (1832).

122. *See, e.g.*, *Harris v. Hardeman*, 55 U.S. (14 How.) 334, 345 (1852) (acknowledging that the writ could be used for this purpose, where a judgment "affects the rights of no third parties [here the petitioners], but is limited in its consequences to the parties to the suit only").

123. *See, e.g.*, *Starbird v. Moore*, 21 Vt. 529, 533 (1848); *Lincoln v. Flint*, 18 Vt. 247, 250 (1846). It is worth noting that *coram nobis* is considered a valid vehicle to achieve a remedy under similar circumstances. *See* ELI FRANK, *CORAM NOBIS: COMMON LAW-FEDERAL-STATUTORY WITH FORMS* 23-27, 36-38 (1953).

124. *Brooks v. Hunt*, 17 Johns. 484, 487 (N.Y. Sup. Ct. 1820) (citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-97 (1819)) (affirming the issuance of a writ *audita querela* to achieve that which the U.S. Supreme Court determined the legislature could not by virtue of the Contract Clause).

125. *Sturges*, 17 U.S. (4 Wheat.) at 122.

126. *Id.* at 197-98 ("The contract binds [the debtor] to pay that money, on that day; and this is its obligation. Any law which releases a part of that obligation, must, in the literal sense of the word, impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it.").

127. *Id.* at 201.

deemed off-limits from the state legislature by both an irregular writ of error and an audita querela.<sup>128</sup> The trial court dismissed the writ of error, but granted the audita querela, and the Supreme Court of Judicature of New York affirmed, having found that audita querela was the appropriate vehicle for review.<sup>129</sup> The writ was apparently sufficiently flexible as to afford relief where a legislative body was constitutionally incompetent to do so.

Especially important for the purposes of this Note is the fact that early American audita querela case law explicitly stated what was implied at early English common law: that there must not merely exist a *legal* error, but also an *equitable* one. Indeed, the Vermont Supreme Court wrote in 1869, “It is not the office of the writ of *audita querela* to correct errors in the judgment.”<sup>130</sup> This strongly suggests that a court would have been unwilling to issue the writ absent a showing of “harm,” that is, an equitable defect.<sup>131</sup> Put another way, the writ could only issue if there was both an equitable claim, which would *then* allow a legal objection (otherwise unavailable absent the equities).

The writ was abolished in federal civil proceedings in 1946,<sup>132</sup> as the Rules Committee expected Rule 60(b) to “deal with the practice in every sort of case in which relief from final judgments is asked.”<sup>133</sup> Federal Rule of Civil Procedure 60(b) affords relief where petitioner can show:

- 1) mistake, inadvertence, surprise, or excusable neglect;
  - 2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a New trial under Rule 59(b);
  - 3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
  - 4) the judgment is void;
  - 5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable;
- or

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128. *Brooks*, 17 Johns. at 486.

129. *Id.* at 487.

130. *Lamson v. Bradley*, 42 Vt. 165, 170 (1869).

131. *Id.*

132. FED. R. CIV. P. 60(e) (“The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.”).

133. *Id.* advisory committee’s notes.

6) any other reason that justifies relief.<sup>134</sup>

This list demonstrates the substantive functions of *audita querela*, as a historical matter, accurately reflected, particularly in numbers three, four, and five.

## 2. Procedural Limitations

*Audita querela* has always been procedurally obscure, and a review of the literature on the subject up through 1990 does little to shed light on the darkness. There are certain bedrock principles that seem well established: the writ was heard in the court of original judgment,<sup>135</sup> judgments on the writ were appealable,<sup>136</sup> and interest accrued on a debt while awaiting judgment on the writ was not recoverable by the creditor.<sup>137</sup> There remained several areas of procedural confusion, however; the most significant for present purposes is the perennial problem of whether the writ was heard at equity or law.<sup>138</sup>

This blurry line between law and equity is never discussed with reference to nonretroactivity in any recorded case before 1990.<sup>139</sup> This may well have been because of the aforementioned presumption in favor of retroactive applicability of judicial rules.<sup>140</sup> Nevertheless, a discussion of the problem of procedural default helps to show that the debate over equity and law was rich even then. Two

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134. *Id.*

135. See *Coffin v. Ewer*, 46 Mass. (5 Met.) 228, 231 (1842) (“It was, by common law . . . a local action, when brought to set aside a judgment or vacate an execution; being required to be brought in the same court in which the judgment was rendered.”).

136. *Fitch v. Scovel*, 1 Root 56 (Conn. Super. Ct. 1773).

137. *Smith v. Canfield*, 1 Root 372, 372 (Conn. Super. Ct. 1792).

138. One area of procedural ambiguity is that of immunity. It has been raised on only two cases of which the Author is aware: *Coffin*, 46 Mass. (5 Met.) at 231, where petitioner sued out the writ against the sheriff for false imprisonment, rather than the creditor who had exacted the execution against petitioner; and *Avery v. United States*, 79 U.S. (12 Wall.) 304, 307 (1870). In *Avery*, the Court cryptically reasoned that because “*audita querela* is a regular suit in which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States, as in England it could not against the Crown.” *Id.* The Court cites *Brooks v. Hunt* for the proposition that *audita querela* is “a regular suit,” but cites nothing (and notably no English cases) supporting the idea that it “cannot . . . be sued against the United States, as in England it could not against the Crown.” *Id.* (citing 17 Johns. 484, 487 (N.Y. Sup. Ct. 1820)). Since no modern case has raised the issue, it has been consigned to a footnote, and, perhaps, to history.

139. The first example of which the Author is aware is *United States v. Ayala*, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990).

140. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

Supreme Court cases in particular throw this issue in stark relief for purposes of this Note. In *Humphreys*, the Court adopted a very lenient approach to default: *audita querela* lies “where a party who has a good defence is too late in making it in the ordinary forms of law.”<sup>141</sup> By contrast, *Avery*, decided only twenty years later, found that the writ “does not lie, where the party complaining has had a legal opportunity of defence and has neglected it.”<sup>142</sup> It is possible—but difficult indeed—to reconcile these two holdings. Perhaps *Humphreys* envisions a scenario in which someone has not failed to neglect a “good . . . defence,” but was forced to be “too late,” for example, by having been afforded inadequate notice.<sup>143</sup> However, such a reading provides reasons where the Court gave none: *Humphreys* does not announce a good faith requirement, it merely says that the writ lies for claims that are made “too late” to have been heard at law.<sup>144</sup>

As was the case in England, at least through *Earl of Oxford’s Case*,<sup>145</sup> *audita querela* occupied a curious space between law and equity. Petitioners were expected to have a “good defense,”<sup>146</sup> which presumably meant that they needed something more than just an appeal to “pure equity;” yet, the Court had accepted by 1850 that the writ was “in its nature a bill in equity” which is issued by courts of law “in modern practice.”<sup>147</sup> Nowhere in the case law is there a hard-and-fast rule requiring a perfect “legal” claim within the four corners of the complaint, and the dichotomy between *Humphreys* and *Avery* lends support to the idea that, even with a legal defense, relief may be denied if the equities do not favor the petitioner.<sup>148</sup>

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141. *Humphreys v. Leggett*, 50 U.S. (9 How.) 297, 313 (1850).

142. *Avery*, 79 U.S. (12 Wall.) at 307 (citing *Lovejoy v. Webber*, 10 Mass. 101, 104 (1813)).

143. See, e.g., *Stone v. Seaver*, 5 Vt. 549, 555 (1833) (explaining the writ lies where debtor is deprived of notice); *Marion v. Wilkins*, 1 Aik. 107, 110 (Vt. 1826) (same);

144. One possible explanation, meriting note only in the margin, is one of prejudice against the petitioner in *Avery*, who clearly fought as a Confederate soldier for the South. *Avery*, 79 U.S. (12 Wall.) at 306. This explanation—purely speculative—would also help to explain the application to his case of an otherwise undiscussed and unsupported doctrine of immunity.

145. (1615) 21 Eng. Rep. 485 (Ch.) 487; 1 Ch. Rep. 1, 9.

146. *Humphreys*, 50 U.S. (9 How.) at 313.

147. *Id.*

148. See *Lamson v. Bradley*, 42 Vt. 165 (1869); *supra* text accompanying notes 130–31.

## II. THE WRIT TODAY

From its inception in the fourteenth century through its abolition in American federal civil proceedings in 1946, *audita querela* occupied an obscure space among the panoply of postjudgment remedies.<sup>149</sup> However, one notable trend has remained constant, and deeply informs the writ's use today: it has consistently afforded litigants, on account of some equitable defense, the opportunity to present legal arguments that are otherwise unavailable on account of a statute or other law.<sup>150</sup> In other words, in order for a recognizer on a Statute Merchant to "have his day in court,"<sup>151</sup> of which the statute itself deprived him, he had to raise an equitable claim (that the statute's operation was unfair in his case), in order to make a legal defense arising subsequent to the judgment.<sup>152</sup> This involved an informal two-step process of the petitioner establishing an equitable claim, and subsequently a legal defense. This process, without having been explicitly stated in the literature, remained in place in the United States through its abolition in 1946.<sup>153</sup>

### A. *Audita Querela's Resurgence*

After the Rules Committee abolished the writ in 1946, expecting Rule 60 substantively to replace it, the writ lay dormant in federal court for forty-two years. Then, by 1990, references to the writ increased by orders of magnitude. What prompted this change?

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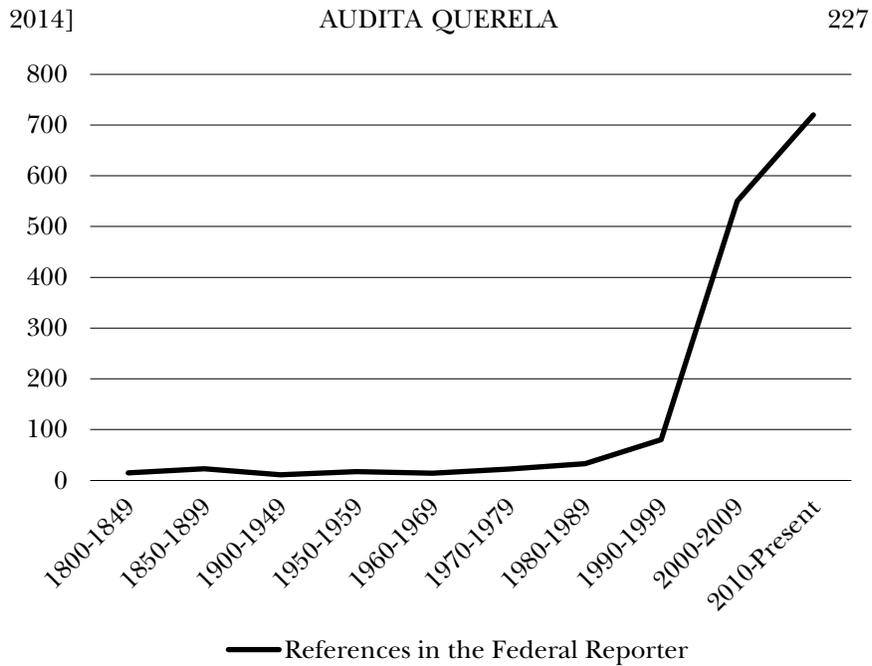
149. See, e.g., *Sneider v. Heidelberger*, 45 Ala. 126, 133 (1871) (noting that *audita querela* is "without well defined limits").

150. Professor Plucknett touches on this conception of the writ, but does not fully elaborate on it. See PLUCKNETT, *supra* note 19, at 136. His notion that Holdsworth overemphasized the equitable nature of the writ is well placed, but his analysis does not sufficiently appreciate role of equity in permitting the legal objection to be heard.

151. See *Cestre v. Anon.*, Y.B. 18 Edw. 3, Trin., pl. 17 (1344) (Eng.), *reprinted in* 11 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 76.

152. Such legal arguments included the classical common law defenses of duress and fraud. See *Goldington v. Bassingbourne*, Y.B. 5 Edw. 2, Hil., pl. 10 (1311) (Eng.), *reprinted in* 31 SELDEN SOCIETY, *supra* note 85. Additionally, the legal claims included that the statute's execution on the petitioner was outside of Parliamentary intent. *Somery v. Teukesbury*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), *reprinted in* 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 386.

153. See, e.g., *Brooks v. Hunt*, 17 Johns. 484, 487 (N.Y. Sup. Ct. 1820) (finding that the petitioner, who had an equitable claim, since they had expected to have their debt annulled, was able to raise a legal claim on an *audita querela*).



As can be seen in Figure 1, cases referring to *audita querela* increased substantially at around the same time as certain, significant legislative enactments and judicial decisions took place, all of which had the effect of bringing the writ out of the context of imprisoned or indigent debtors and into the modern prison.<sup>154</sup> First, in 1990, Congress abolished the Judicial Recommendation Against Deportation (JRAD) provisions of the Immigration and Nationality Act (INA).<sup>155</sup> First, this led to a massive influx of references to

154. The statistics in Figure 1 were obtained by searching for the phrase “*audita querela*” in WestLaw Next on February 15, 2014. Figure 1 is overbroad in that it includes references to “*audita querela*” that consist only of direct quotes from Rule 60(e) that “abolish[ ] bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and *audita querela*.” According to the WestLaw Next search, such is the case for most of the cases from 1946–1990. After approximately 1988, the number of times this phrase from Rule 60(e) appeared in the search results dropped precipitously, while the number of actual *audita querela* petitions rose dramatically.

155. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (current version at 8 U.S.C. § 1227 (2012)). Before the INA was passed in 1952, “there was no such creature as an automatically deportable offense.” *Padilla v. Kentucky*, 559 U.S. 356, 362–63 (2010). The INA substantially circumscribed the JRAD procedure in the form it was originally passed, and the procedure was ultimately abolished in 1990. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 237, 66 Stat. 163, 201, *amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (current version at 8 U.S.C. § 1227 (2012)). For a

audita querela relief in the Federal Reporter, derived from the petitions of federal prisoners who were deprived of an opportunity to seek a binding JRAD order against removal.<sup>156</sup> Next, a second influx of references occurred after Congress passed the AEDPA in 1996, which, inter alia, codified the Court's nonretroactivity doctrines and imposed severe filing limits on the availability of federal postconviction review for state and federal prisoners.<sup>157</sup> Finally, another increase in audita querela references occurred after 2005, when the Court decided the Sentencing Guidelines were unconstitutional as violative of the Sixth Amendment.<sup>158</sup>

### B. Legal Foundations

The question of *Booker's* retroactivity on petitions for audita querela relief is illustrative, and will occupy the remainder of this Note. However, before addressing this issue squarely, it is essential to discuss the two central sources of law that ought to permit the federal courts to hear audita querela petitions in the first place: the All Writs Act, which authorizes federal courts to issue common law writs under certain circumstances;<sup>159</sup> and the rule in *Morgan*, which

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valuable overview of the JRAD provision and its interpretation since its passage in the Immigration Act of 1917, see *Padilla*, 559 U.S. at 362–63 (discussing Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889–90).

156. See, e.g., *United States v. Johnson*, 962 F.2d 579 (7th Cir. 1992). The earliest cases from this period do not, in fact, deal explicitly with JRAD; rather, they are concerned with the slow but certain eroding of judicial discretion to stay deportation that preceded the abolition of JRAD. See, e.g., *United States v. Grajeda-Perez*, 727 F. Supp. 1374 (E.D. Wash. 1989) (finding that the court's JRAD had “apparently been of no avail”).

157. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2012)). For a clear example of a habeas petitioner seeking to characterize a successive § 2255 motion as an audita querela petition in order to bypass the AEDPA's bar on successive petitions, see *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1080 (9th Cir. 2001) (“A prisoner may not circumvent valid congressional limitations on collateral attacks by asserting that those very limitations create a gap in the postconviction remedies that must be filled by the common law writs.”). See also *Brackett v. United States*, 206 F. Supp. 2d 183, 187 (D. Mass. 2002) (refusing to allow federal prisoner to characterize successive § 2255 motion as audita querela petition).

158. *United States v. Booker*, 543 U.S. 220, 233–34 (2005). In the context of *Booker*, only two cases take audita querela seriously. See *Kessack v. United States*, No. C05-1825Z, 2008 WL 189679, at \*5–6 (W.D. Wash. Jan. 18, 2008) (granting the petition); *Villafranco v. United States*, No. 2:05-CV-368BSJ, 2006 WL 1049114, at \*10–23 (D. Utah Apr. 18, 2006) (denying the petition); see also *United States v. Richter*, 510 F.3d 103 (2d Cir. 2007) (illustrating how cases that dismiss audita querela petitions without significant historical or procedural analysis proceed).

159. See 28 U.S.C. § 1651 (2012).

enables courts to use common law writs authorized under the Act to fill the interstices of the federal post-conviction apparatus.<sup>160</sup>

### 1. The All Writs Act

Originally enacted as part of the Judiciary Act of 1789,<sup>161</sup> the All Writs Act empowers the Supreme Court and all congressionally created courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>162</sup> The proper scope of the act “has generated considerable litigation and confusion,”<sup>163</sup> but several important bedrock principles are relevant to the present inquiry.

First, the Act does not *confer* independent jurisdiction on federal courts.<sup>164</sup> A court must have an independent source of federal question or personal jurisdiction,<sup>165</sup> and the writ serves to “protect” that jurisdiction.<sup>166</sup> But protect it from what? In some cases, from state court proceedings that interfere with a federally approved set-

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160. *See* United States v. Morgan, 346 U.S. 502 (1954).

161. ch. 20, 1 Stat. 73 (1789). For a concise history of the law of the Judiciary Act of 1789, particularly as it relates to postconviction review, see William F. Harvey, 28 U.S.C. § 2255: *From Habeas Corpus to Coram Nobis*, 1 WASHBURN L.J. 381, 381–87 (1961).

162. 28 U.S.C. § 1651 (2012). The language related to forum—“the Supreme Court and all courts established by Act of Congress”—includes Article I tribunals, at least for purposes of postconviction review under certain circumstances. *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (“[W]e do not believe there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court.”); *see also* United States v. Denedo, 556 U.S. 904, 917 (2009) (finding, first, that Article I courts are within the contemplation of § 1651; and, second, that a *coram nobis* petition challenging the validity of a military conviction is within federal question jurisdiction presupposed by § 1651).

163. 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3691 (4th ed. 2010).

164. *See, e.g.*, *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813) (“[T]he power of the Circuit Courts [under the All Writs Act] is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.”); *accord* United States v. N.Y. Tel. Co., 434 U.S. 159, 188 n.19 (1977); United States v. *Tablie*, 166 F.3d 505, 507 (2d Cir. 1999) (“[T]he All Writs Act ‘is not a grant of plenary power to the federal courts,’ but instead ‘is designed to preserve jurisdiction that the court has acquired from some other independent source in law.’” (quoting *Doe v. I.N.S.*, 120 F.3d 200, 204–05 (9th Cir. 1997))).

165. 28 U.S.C. §§ 1331–32 (2012); *see also* *Achtman v. Kirby*, *McInerney & Squire, LLP*, 464 F.3d 328, 333–34 (2d Cir. 2006).

166. 14AA WRIGHT & MILLER, *supra* note 163; *see also In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liab. Litig.*, 369 F.3d 293, 297 (3d Cir. 2004).

tlement;<sup>167</sup> in others, the Act protects a sentencing court's power "to prevent [a] defendant from frustrating the collection of [ ] restitution debt;"<sup>168</sup> in yet others, most relevant to our purposes here, the Act protects federal courts from congressionally induced restrictions on their common law jurisdiction.<sup>169</sup> This particular "independent source of law"<sup>170</sup> is discussed in greater depth in Part II.B.2.

Next, where the Act is available, it confers on the issuing court a wide discretion: by the words of the statute, "in aid" of the court's jurisdiction, and "agreeable" with the purposes of law.<sup>171</sup> The Court has described this power as the "means for achieving the rational ends of law,"<sup>172</sup> and the Federal Reporter is rife with decisions struggling to determine the extent of this wide discretionary latitude within the "rational ends of law" without "mak[ing] mincemeat of the limited grants of jurisdiction bestowed upon [the federal courts]."<sup>173</sup> What is clear from the few Supreme Court decisions concerning the domain of the Act in postconviction litigation is that federal courts have "belated" jurisdiction over criminal cases that have become final.<sup>174</sup>

As the foregoing suggests, the question of whether a federal court has jurisdiction to issue any common law writ—whether

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167. See, e.g., *In re Prudential Ins. Co. Sales Practices Litig.*, 314 F.3d 99, 103–05 (3d Cir. 2002).

168. See, e.g., *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012) (ensuring compliance with the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A (2012)).

169. See, e.g., *United States v. Morgan*, 346 U.S. 502, 506–07 (1954) ("If there is power granted to issue writs of coram nobis by the all-writs section, we hold that it would comprehend the power for the District Court to take cognizance of this motion in the nature of a coram nobis. . . . The writ of coram nobis was available at common law to correct errors in fact."); see also *United States v. Denedo*, 556 U.S. 904, 917 (2009).

170. *United States v. Tablie*, 166 F.3d 505, 507 (2d Cir. 1999).

171. 28 U.S.C. § 1651 (2012).

172. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

173. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 334 (2d Cir. 2006).

174. *Denedo*, 556 U.S. at 912–13 (quoting *Morgan*, 346 U.S. at 505 n.4) ("Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired. (*coram nobis* is 'a step in the criminal case, and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding.')."). For a discussion regarding this obscure footnote from *Morgan*, see Robbins, *supra* note 22, at 667 n.171.

coram nobis, audita querela, or an “independent action”<sup>175</sup>—turns on whether the court has jurisdiction over a “case” or “controversy.”<sup>176</sup> Thus a threshold question is whether, in a postjudgment setting, a petition for relief is construed as a “new” suit, or “a step in the criminal case” over which the court had original jurisdiction.<sup>177</sup> The case law strongly suggests that federal postjudgment petitions for relief (coram nobis, audita querela, and motions under § 2255) are mere “steps” in the criminal case.<sup>178</sup> The central idea is, because the court had original jurisdiction over the “case,” and the petition contests the validity or continued application of the judgment, it remains within the court’s contemplation.<sup>179</sup> To the extent that petitions for audita querela, and coram nobis for that matter, are directed to the sentencing court,<sup>180</sup> and habeas often necessitates a new “civil” lawsuit in a different court, with different respondents,<sup>181</sup> the former are clearly classed within those actions that are a “step” in an already-existing case.

## 2. The Rule in *Morgan*

Once it is established that a petition for postjudgment relief rests upon a pre-existing, independent source of federal jurisdiction,<sup>182</sup> the question becomes *when* a federal court may avail itself of the Act and issue a common law writ in the context of postjudgment litigation. This question was addressed in *United States v. Mor-*

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175. See *Pac. R.R. of Mo. v. Mo. Pac. Ry. Co.*, 111 U.S. 505, 522 (1884) (finding jurisdiction over suit in the form of an “original suit”). In *Denedo* the Court characterized the “original suit” in *Pacific Railroad of Missouri* as an “independent action,” constituting an “equitable means to obtain relief from judgment.” *Denedo*, 556 U.S. at 913 (citing *Pac. R.R. of Mo.*, 111 U.S. at 522).

176. U.S. CONST. art. III, § 2, cl.1.

177. *Morgan*, 346 U.S. at 505 n.4.

178. See *Denedo*, 556 U.S. at 913 (characterizing petition for coram nobis as a step); *Pacific R.R. Co. of Mo.*, 111 U.S. at 522 (characterizing “independent action,” which like audita querela was traditionally considered a “original bill in the chancery sense of the word,” as “a continuation of the former suit, on the question of the jurisdiction of the . . . court”); RANDY HERTZ & JAMES L. LIEBMAN, *HABEAS CORPUS PRACTICE AND PROCEDURE* § 25.6 (6th ed. 2013) (characterizing a motion under § 2255 as a step).

179. See *Morgan*, 346 U.S. at 505 n.4.

180. See FED. R. CIV. P. 60(e) advisory committee’s note (stating that audita querela lies in court of original judgment).

181. This is an oversimplified conception of habeas, of course. To problematize this rudimentary description, see 1 HERTZ & LIEBMAN, *supra* note 178, at § 2.2 (describing the “civil, appellate, collateral, common law, and statutory” nature of the writ).

182. *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813).

*gan*, in which the petitioner sought a writ of error coram nobis,<sup>183</sup> and the Court concluded that courts could issue writs to fill remedial gaps in the infrastructure of federal statutory habeas.<sup>184</sup>

The facts of the case are simple: the prisoner was convicted in the Northern District of New York in 1939, and served a four-year sentence.<sup>185</sup> He was later convicted on a state charge in New York in 1950, and was sentenced to an enhanced term as a “second offender.”<sup>186</sup> He petitioned the sentencing court in the Northern District of New York for a writ of error coram nobis vacating his federal conviction on grounds of its having been obtained in violation of the Sixth Amendment’s Assistance of Counsel Clause.<sup>187</sup> The success of his petition would require resentencing at the state level, since he would no longer be considered a “second offender.”<sup>188</sup>

The two central arguments against relief consisted of a jurisdictional defense and a statutory claim.<sup>189</sup> The government first argued that the All Writs Act did not authorize the writ, since there was no subject matter or personal jurisdiction over the case; Justice Reed disposed of this with dispatch on the grounds discussed in the preceding section, that is, that the writ constituted a step in a case over which the court had preexisting jurisdiction.<sup>190</sup>

The second argument rested on the idea that 28 U.S.C. § 2255, which requires that the movant be in custody,<sup>191</sup> “cover[ed] the entire field” of all postjudgment remedy, and thus prohibited the use of auxiliary forms of review.<sup>192</sup> Seeing “no compelling reason to reach that conclusion,” the Court explained that “[n]owhere in the history of Section 2255 do we find any purpose to impinge

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183. *Morgan*, 346 U.S. at 502.

184. *Id.* at 510–11 (“We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion.”).

185. *Id.* at 502. This case has attracted considerable scholarly attention. *See, e.g.*, Robbins, *supra* note 22, at 656–58; Dan Garcia, Comment, *The Coram Nobis Writ in an Immigration Law Context*, 2 CHICANO L. REV. 92, 96–98 (1975); Brendan W. Randall, Comment, *United States v. Cooper: The Writ of Error Coram Nobis and the Morgan Footnote Paradox*, 74 MINN. L. REV. 1063 (1990).

186. *Morgan*, 346 U.S. at 503–04.

187. *Id.* at 502; *see also* *United States v. Morgan*, 222 F.2d 673, 674 (2d Cir. 1955) (vacating *Morgan*’s federal conviction on remand from the Supreme Court for violation of the Sixth Amendment).

188. *See Morgan*, 346 U.S. at 514.

189. *See id.* at 506–07, 510–11.

190. *Id.* at 505 n.4.

191. 28 U.S.C. § 2255(a) (2012) (limiting relief to “a prisoner in custody under sentence of a court established by Act of Congress”).

192. *Morgan*, 346 U.S. at 510.

upon prisoners' rights of collateral attack upon their convictions.'<sup>193</sup> The Court thus found that § 2255's custodial requirement did not preclude the issuance of the writ.<sup>194</sup>

"The teaching of *Morgan*," Judge Edwards of the District Court for the District of Columbia has eloquently stated, "is that federal courts may properly fill the interstices of the federal postconviction remedial framework through remedies available at common law."<sup>195</sup> These interstices apparently include the definitional opposite of basic standing prerequisites such as the custodial requirement of § 2255,<sup>196</sup> as well as the provisions for appellate review in the Uniform Code of Military Justice.<sup>197</sup>

The three questions every *audita querela* litigant must answer, then, are: (1) will the court have jurisdiction over the petition under the All Writs Act; (2) does the injury represent a "gap" in the postconviction remedial framework; and (3) does *audita querela* fill this gap. The answer to the first question will almost always be "yes," for the reasons discussed above. Like *coram nobis*,<sup>198</sup> *audita querela* is heard in the court of first instance,<sup>199</sup> and though it was considered an "original bill in the chancery sense," it is essentially a "continuation of the former suit" for purposes of jurisdiction.<sup>200</sup> And because it is a *continuation* of a *criminal* suit, it is not barred by the abolition of the writ in federal *civil* practice under Rule

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193. *Id.* at 510–11 (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952)).

194. *Id.* at 512–13.

195. *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990).

196. *United States v. Morgan*, 346 U.S. 502, 511 (1954) (finding that if § 2255 requires custody, there is a remedy for those outside of custody).

197. *See* *United States v. Denedo*, 556 U.S. 904, 914–15 (2009) (construing 10 U.S.C. § 866(c), which allows only "review of findings and sentence as approved by the convening authority" to include ineffective assistance of counsel claims, which necessarily include creation of a new record).

198. *Morgan*, 346 U.S. at 505 n.4.

199. *Jones v. Watts*, 142 F.2d 575, 576 (5th Cir. 1944); *Coffin v. Ewer*, 46 Mass. (5 Met.) 228, 230 (1842); *Shumway v. Sargeant*, 27 Vt. 440, 442 (1855); *Gleason v. Peck*, 12 Vt. 56, 58–59 (1840).

200. *Pac. R.R. of Mo. v. Mo. Pac. Ry. Co.*, 111 U.S. 505, 522 (1884). No modern court of which the Author is aware has made any definitive argument to the contrary. *See, e.g.*, *Triestman v. United States*, 124 F.3d 361, 380 n.24 (2d Cir. 1997) (suggesting circumstances under which *audita querela* may be available).

60(b).<sup>201</sup> Any challenge to the writ's application will rest, not so much on jurisdiction, but on scope.<sup>202</sup>

The second and third questions are not as easily answered. Before exploring them, it is useful to recall the role of *audita querela*: the petition has historically been used to air legal objections to the execution of a judgment, based upon the judgment's inequitable operation.<sup>203</sup> A petitioner needs both an equitable claim (based on disproportionality, for example) and a legal objection based on circumstances that have changed since the rendering of judgment.<sup>204</sup> Bearing this in mind, this Note turns to the application of the writ in the context of federal sentencing, with special emphasis on federal nonretroactivity doctrine.

### C. Resentencing Under Booker

#### 1. Background

The tremors of what Justice O'Connor reportedly described as the "No. 10 earthquake"<sup>205</sup> ushered in by *Blakely v. Washington*<sup>206</sup> and subsequently *United States v. Booker*<sup>207</sup> continues to be felt in federal court today. Prior to these cases, the U.S. Sentencing Guidelines were mandatory, and sentencing enhancements were applied without jury findings of fact.<sup>208</sup> *Blakely* and *Booker* held that the Sixth Amendment's Jury Clause requires that "any particular fact" essential to the defendant's punishment be submitted to a jury and

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201. FED. R. CIV. P. 60(b). See *Morgan*, 346 U.S. at 505 n.4 ("As it is such a step, we do not think that Rule 60(b) . . . expressly abolishing the writ of error *coram nobis* in civil cases, applies.").

202. *Denedo*, 556 U.S. at 916–17 ("In sum, the government's argument speaks to the scope of the writ, not the [United States Navy-Marine Corps Court of Criminal Appeals]'s jurisdiction to issue it.").

203. See *supra* Part I.B.

204. See *supra* text accompanying notes 130–31.

205. *Senate, Judges Urge 'Blakely' Redux*, N.Y.L.J., July 26, 2004, at 2.

206. 542 U.S. 296, 305 (2004).

207. 543 U.S. 220 (2005).

208. It was cases decided during this period that turned the tide on the determinacy revolution in sentencing, and made *Blakely* and *Booker* possible. See *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (requiring any aggravating factor that would elevate a sentence to death to be submitted to a jury and proved beyond a reasonable doubt, even if characterized by statute as a "sentencing factor"); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring any facts that enhance a sentence beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227, 251–52 (1999) (requiring jury determination of facts that raise a sentencing ceiling by deciding that "serious bodily injury" was an element of the federal carjacking statute, 18 U.S.C. § 2119).

proven beyond a reasonable doubt.<sup>209</sup> These decisions essentially turned on language in *Apprendi v. New Jersey* prohibiting enhancement beyond a “statutory maximum” without proof beyond a reasonable doubt;<sup>210</sup> the Court construed “statutory maximum,” not as simply the ceiling set forth in the statute, but rather as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”<sup>211</sup> The remedy, decided on by a different majority of the Court than decided the constitutional issue, was to excise the provision in the Guidelines that rendered them mandatory.<sup>212</sup>

Despite Justice O’Connor’s comment regarding the seismic nature of these rulings,<sup>213</sup> no federal court of appeals has found *Booker* to apply retroactively on habeas under § 2255 to cases final at the time the decision was issued.<sup>214</sup> Every decision on the matter rests upon several propositions. First, *Booker* represents a “new” rule because it is not “dictated by precedent,”<sup>215</sup> meaning it is presumptively nonretroactive.<sup>216</sup> Second, the courts of appeals have found

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209. *Blakely*, 542 U.S. at 305 (considering state sentencing guidelines); *Booker*, 543 U.S. at 233 (considering Federal Sentencing Guidelines).

210. *Apprendi*, 530 U.S. at 490.

211. *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303).

212. *Id.* at 245 (“[T]he provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), [are] incompatible with today’s constitutional holding. We conclude that this provision must be severed and excised . . . [s]o modified . . . the Guidelines [are] effectively advisory.”).

213. See *Senate, Judges Urge ‘Blakely’ Redux*, *supra* note 205. One might suppose that the exception for “watershed rules” in *Teague v. Lane* might include “earthquake” rules such as *Blakely* and *Booker*. See *Teague v. Lane*, 489 U.S. 288, 311 (1989). Such is apparently not the case.

214. See *In re Fashina*, 486 F.3d 1300, 1304–06 (D.C. Cir. 2007) (finding that *Booker* was neither a new substantive rule nor a “watershed” rule for purposes of the *Teague* exceptions); *Cirilo-Muñoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005) (same); *Guzman v. United States*, 404 F.3d 139, 142–43 (2d Cir. 2005) (same); *Lloyd v. United States*, 407 F.3d 608, 614–15 (3d Cir. 2005) (same); *United States v. Morris*, 429 F.3d 65, 71–72 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 604–05 (5th Cir. 2005) (same); *Humphress v. United States*, 398 F.3d 855, 861–62 (6th Cir. 2005) (same); *McReynolds v. United States*, 397 F.3d 479, 480–81 (7th Cir. 2005) (same); *Never Misses a Shot v. United States*, 413 F.3d 781, 783–84 (8th Cir. 2005) (same); *United States v. Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005) (same); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005) (same); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (same).

215. *Teague*, 489 U.S. at 301.

216. For an illustrative example of the reasoning that *Booker* was not “compelled” by *Apprendi* or even *Blakely*, see *Guzman*, 404 F.3d at 142. Some litigants have argued that *Booker* was dictated by *In re Winship*, 397 U.S. 358, 365 (1970), which made the reasonable doubt standard a constitutional requirement for con-

that *Booker* does not enunciate a “substantive” rule for purposes of the first *Teague* exception: as the Court described the test in *Schriro v. Summerlin*, it neither “narrow[s] the scope of a criminal statute” nor puts the accused “beyond the State’s power to punish.”<sup>217</sup> Third, as a rule of “procedure,”<sup>218</sup> the courts have found *Booker* is not a watershed rule per the second *Teague* exception, because by shifting decisionmaking power from one actor (the judge) to another (the jury), neither the accuracy nor the fairness of the judgments is meaningfully impaired.<sup>219</sup>

Lurking beneath the mechanical operation of the rule in *Teague*, however, there is a deeper concern. “Realistically,” wrote Judge Torruella of the First Circuit three months after *Booker* was handed down, “it is unlikely that the Supreme Court will adopt a retroactivity analysis that opens up to *required* reexamination of *practically all* of the federal sentences imposed since the guidelines went into effect in 1987.”<sup>220</sup> Indeed if *Booker* were made retroactive, *every* federal prisoner would be eligible for resentencing, since their sentences were necessarily imposed unconstitutionally.

Thus many thousands of federal prisoners, who were sentenced under a procedure in violation of the Sixth Amendment, are deprived of the opportunity to challenge their sentences by the

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viction. See *In re Zambrano*, 433 F.3d 886, 88 (D.C. Cir. 2006). This argument has been unavailing, since “there are too many logical steps between *Winship* and *Booker* to conclude that it ‘necessarily’ follows that if *Winship* is retroactive, *Booker* must be as well.” *Id.* at 888–89.

217. 542 U.S. 348, 351–52 (2004) (finding the rule in *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002), was nonretroactive as a nonwatershed rule of procedure).

218. *Id.* at 353 (“Rules that allocate decisionmaking authority in this fashion [i.e., from judge to jury, as in *Ring*] are prototypical procedural rules.”).

219. *Teague*, 489 U.S. at 311–12 (discussing how the “watershed” exception combines a concern for the “accuracy” and “fairness” of the proceeding the rule affects). The Court has never declared any new rule to fit into this exception, but has suggested that any such rule would have to be as significant as *Gideon v. Wainwright*, 372 U.S. 335 (1963), which established an affirmative right to counsel in all felony prosecutions. *Saffle v. Parks*, 494 U.S. 484, 495 (1990); see also *Cruz*, 423 F.3d at 1120–21 (quoting *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005)) (alteration in original) (“[A] ‘change in the law requiring that juries, rather than judges, make the factual findings on which a sentence is based [does] not announce a watershed rule of criminal procedure.’”); *United States v. Price*, 400 F.3d 844, 848 (10th Cir. 2005) (“[A] change in the law requiring juries to find these sentencing facts beyond a reasonable doubt, rather than by a preponderance of the evidence . . . does not announce a watershed rule of criminal procedure.”).

220. *Cirilo-Muñoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005) (emphasis added). For an analysis of the “floodgates” implications of pre-*Booker* sentencing rulings, see Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation”*, 6 U. PA. J. CONST. L. 377, 413–18 (2003).

operation of the rule in *Teague* and, at bottom, a practical concern regarding the opening of the proverbial “floodgates” should the rule become retroactive for *all* petitioners.

## 2. Audita Querela and *Booker*

Use of audita querela, in its operation through the All Writs Act, would fundamentally alter this calculus: first, by filling the gap in the federal postconviction framework created by *Teague* and its operation in § 2255; and second, by ensuring that the “floodgates” do not inundate the federal judiciary with demands for resentencing. This conclusion is derived from the nature of the writ itself—its individualized, quasi-equitable, quasi-legal nature discussed in Part I—and from the limits of nonretroactivity as described in *Teague*.

Recall the three questions every audita querela litigant must answer: first, whether the court has jurisdiction; second, whether there is a gap to fill; third, whether audita querela fills this gap.<sup>221</sup> A strong *Booker* petition, couched in audita querela, would answer all three questions in the affirmative.<sup>222</sup> Recall that audita querela has historically required a showing of *equitable* cause, in order for the petition to become justiciable.<sup>223</sup> Once that equitable claim has succeeded, the court may proceed to entertain a legal defense, based on circumstances that have changed since rendering of judgment.<sup>224</sup>

One case in particular is instructive. In 1989, Donald Kessack was sentenced, under the then-mandatory Sentencing Guidelines,<sup>225</sup> to 360 months on several counts of drug and money laun-

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221. See *supra* Part II.B.2.

222. The question of jurisdiction is resolved on the “extended jurisdiction” grounds described in *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954).

223. See *United States v. Salgado*, 692 F. Supp. 1265, 1270 (E.D. Wash. 1988) (creating what served as an equitable estoppel defense where petitioner had detrimentally relied, in part, on the I.N.S.’s failure to take his Green Card as a sign that he was legally in the country); *Humphreys v. Leggett*, 50 U.S. (9 How.) 297, 313 (1850); *Earl of Oxford’s Case*, (1615) 21 Eng. Rep. 485 (Ch.) 487; 1 Ch. Rep. 1, 9 (referring to the writ audita querela as a “Latin Bill in Equity” and referring to several equitable situations in which the writ would issue); *Somery v. Teukesbury*, Y.B. 17 Edw. 3, Pasch., pl. 24 (1343) (Eng.), reprinted in 9 YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, *supra* note 72, at 386; *PLUCKNETT*, *supra* note 19, at 136.

224. *Salgado*, 692 F. Supp. at 1270 (discussing the newly created right, that is, eligibility for relief under the Immigration Reform and Control Act, 8 U.S.C. § 1255a (2012)).

225. See *Minstretta v. United States*, 488 U.S. 361, 412 (1989) (upholding constitutionality of the Sentencing Commission, and by extension the determinate sentencing regime promulgated by the Sentencing Reform Act of 1984).

dering.<sup>226</sup> His co-defendant, Richard Petty, was also sentenced to 360 months, but had his sentence reduced on appeal, and ultimately served 120 months.<sup>227</sup> Mr. Kessack and Mr. Petty both pleaded to the same charges, and no one supposed that they were anything other than equally culpable.<sup>228</sup> Mr. Kessack had exhausted his direct appeals and § 2255 motion, and been denied leave for a successive motion under § 2255.<sup>229</sup>

The threshold question,<sup>230</sup> then, was whether the nonretroactivity of *Booker*, already established in the Ninth Circuit by *United States v. Cruz*,<sup>231</sup> created a gap in the postconviction remedial framework.<sup>232</sup> Just as the custodial requirement of § 2255 creates a “gap,”<sup>233</sup> so, too, does the nonretroactivity rule. The nonretroactivity rule, if applied broadly to encompass auxiliary forms of common law review besides habeas, would unduly “impinge upon prisoners’ rights of collateral attack upon their convictions.”<sup>234</sup> And perhaps more importantly, such an overextension of *Teague* and the nonretroactivity doctrine in § 2255 would encroach upon federal jurisdiction by depriving courts of their ability to issue the writ *audita querela* “in aid of their respective jurisdictions,”<sup>235</sup> and toward the “rational ends of law.”<sup>236</sup>

Once *audita querela* is appreciated as a distinct common law remedy, independent of habeas and *coram nobis*, it becomes clear that *Teague* and its statutory version in the successive petition portion of § 2255 create the sort of gap envisioned by *Morgan*<sup>237</sup> and *Denedo*.<sup>238</sup> Indeed, it was essential in *Morgan* that *coram nobis* be

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226. *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679, at \*1 (W.D. Wash. Jan. 18, 2008).

227. *United States v. Petty*, 80 F.3d 1384 (9th Cir. 1996).

228. *Kessack*, 2008 WL 189679, at \*1.

229. *Kessack*, 2008 WL 189679, at \*2 (discussing motions under § 2255); *United States v. Kessack*, No. 90-30240, slip op. at 1 (9th May 3, Cir. 1993) (affirming sentence).

230. The Court bypassed the question of whether it had jurisdiction over the claim in the first place. *See supra* Part II.B.1. This might have been because the court simply assumed such “belated” jurisdiction as described in *United States v. Denedo*, 556 U.S. 904, 917 (2009).

231. 423 F.3d 1119, 1120 (9th Cir. 2005).

232. *Kessack*, 2008 WL 189679, at \*2.

233. *United States v. Morgan*, 346 U.S. 502, 510 (1954).

234. *United States v. Hayman*, 342 U.S. 205, 219 (1952).

235. 28 U.S.C. § 1651 (2012).

236. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

237. 346 U.S. at 511.

238. *United States v. Denedo*, 556 U.S. 904, 917 (2009).

appreciated as a distinct common law remedy.<sup>239</sup> *Coram nobis* had historically been used to challenge an underlying conviction once the sentence had already been served.<sup>240</sup> Clearly, § 2255's custodial requirement butted heads with this noncustodial remedy. A similar situation is presented here, where *audita querela* specifically envisions *changes in the law*, and § 2255 and *Teague* make such changes unavailable in habeas. Habeas, of course, operates with different rules, different expectations, and with a "broad scope of [cognizable] constitutional issues."<sup>241</sup> *Audita querela* is not so structured, and makes cognizable only those legal claims that are predicated on sufficiently strong equitable claims.<sup>242</sup>

This equity-as-gatekeeper step is essential. In a previous, seemingly similar petition in the Ninth Circuit, several prisoners made a similar argument for a *Booker* sentence correction.<sup>243</sup> However, the petition failed under the logic of *audita querela*'s structure, since the petitioners failed to bring forward "any evidence that they were uniquely impacted by the Guidelines or that there are any equities that distinguish them from other defendants sentenced before *Booker*."<sup>244</sup>

Having established jurisdiction and determined that the case raised a claim that fit within a gap in the remedial architecture of the federal system,<sup>245</sup> it remained for the *Kessack* court to rule on the merits of the *audita querela* petition. Determining that a "grave injustice is occurring," the court scheduled resentencing.<sup>246</sup>

### III. OBJECTIONS

*Kessack* has been openly derided by those few decisions that have addressed its reasoning.<sup>247</sup> The central objections consist of

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239. *Morgan*, 346 U.S. at 507–09.

240. See, e.g., STANLEY H. FULD, *THE WRIT OF ERROR CORAM NOBIS* (1947).

241. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 688–89 (1971) (Harlan, J., concurring)).

242. See *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679, at \*6 (W.D. Wash. Jan. 18, 2008).

243. *Carrington v. United States*, 503 F.3d 888, 893 (9th Cir. 2007).

244. *Id.*

245. The court's language on this point is valuable: "The Court declines to construe Mr. Kessack's Writ of *Audita Querela* as a 28 U.S.C. § 2255 motion in light of *United States v. Morgan*, and, therefore, the ban on second or successive habeas motions does not apply to Mr. Kessack." *Kessack*, 2008 WL 189679, at \*6.

246. *Id.* at \*7.

247. The most comprehensive discussion can be found in *United States v. Loveless*, No. 4:95CR3054, 2010 WL 489534, at \*3–6 (D. Neb. Feb. 8, 2010).

the propositions that, first, § 2255 provides an adequate remedy; second, even if § 2255 was inadequate, *Teague* would bar *Booker*'s retroactive applicability to audita querela petitions;<sup>248</sup> and third, even if such a claim could be made, the writ could not lie without doing harm to the separation of powers.<sup>249</sup>

#### A. Adequacy

The first objection to this Note's proposed model of audita querela and nonretroactivity is, simply, that the type of claim posited by the prisoner is ordinarily cognizable under § 2255.<sup>250</sup> Namely, in making a *Booker* correction claim, the petitioner must be arguing that her "sentence was imposed in violation of the Constitution of the United States,"<sup>251</sup> and thus characterizing her petition as one for audita querela, or anything else, is simply an effort to evade § 2255's bar on successive petitions.<sup>252</sup>

As the analysis above suggests, however, audita querela is, in fact, an independent remedy for an independent harm: the petitioner is not, as the courts would suggest, demanding relief for a "sentence that was imposed in violation of the Constitution of the United States."<sup>253</sup> Indeed, the prisoner necessarily concedes that the sentence was valid at the time of judgment; naturally, she cannot argue that *Booker* retroactively damages the constitutionality of the sentence. Rather, she argues that the continued application of the sentence, in light of both the equities (disproportional impact as compared to post-*Booker* sentences), and the new "defense or discharge" raised by *Booker*, she deserves resentencing. This is not *mandatory* on the court—as a fundamental constitutional error would be on § 2255—it is, rather, an extraordinary remedy to rectify those limited situations where, not only does the petitioner raise a "legal" defense (that is, the *Booker* claim), but also can point to substantial equitable injustice.

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248. *Villafranco v. United States*, No. 2:05-CV-368BSJ, 2006 WL 1049114, at \*23 (D. Utah Apr. 18, 2006).

249. *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991).

250. *Villafranco*, 2006 WL 1049114, at \*19.

251. 28 U.S.C. § 2255 (2012).

252. *See, e.g.*, *Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004) ("Prisoners cannot avoid the AEDPA's rules by inventive captioning. Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255 ¶ 1, is a motion under § 2255 no matter what the title the prisoner plasters on the cover. Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela . . . the name makes no difference.")

253. 28 U.S.C. § 2255(a) (2012).

In further support of this notion is the fact that, indeed, *Booker* claims *are not cognizable* on motions for relief under § 2255. If, as the Seventh Circuit has written, “[I]t is the substance[, not the title of the motion] that controls,”<sup>254</sup> and *Booker* does not implicate the constitutionality of the original judgment because it is nonretroactive, no petitioner can argue that it “was imposed in violation of the Constitution of the United States.”<sup>255</sup>

### B. Finality

The second objection concerns the common law application of *Teague* rather than the operation of its statutory “codification” in § 2255(h)(2) for purposes of successive motions.<sup>256</sup> This objection only comes into play if a court is willing to imagine that the *Booker* claim is non-cognizable under § 2255; if it *is* cognizable, the inquiry stops at the bar on successive petitions.<sup>257</sup> The argument is erroneous for at least three reasons.

First, the novel rule in *Teague* and its progeny is deeply tied to the nature of habeas in particular, and its logic should not extend to auxiliary vehicles of post-conviction review.<sup>258</sup> *Teague* rested in large part upon interpretations of Justice Harlan’s dissents in previous habeas cases, and at the heart of its reasoning quoted him at length on habeas’ *function* as a vehicle to air a “broad scope” of grievances:

Given the “broad scope of constitutional issues cognizable on habeas,” Justice Harlan argued that it is “sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose

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254. *Id.* See also *United States v. Loveless*, No. 4:95CR3054, 2010 WL 489534, at \*4 (D. Neb. Feb. 8, 2010).

255. 28 U.S.C. § 2255(a) (2012).

256. See 28 U.S.C. § 2255(h)(2) (2012) (“A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”).

257. Many courts have been willing to proceed to this objection, even if ruling that the motion is barred by § 2255(h)(2), as early as 1990. See, e.g., *United States v. Ayala*, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990). The inquiry of whether *Teague* should apply to *audita querela* illustrates the fact that the AEDPA did not “codify” *Teague* to the exclusion of its application to other postconviction settings besides statutory habeas. See *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); Kovarsky, *supra* note 9.

258. See *Hack*, *supra* note 22, at 215–17. *But see* *Chaidez v. United States*, 133 S. Ct. 1103, 1106 n.1 (2013) (assuming, without deciding, that *Teague* applied to a *coram nobis* petition); *United States v. Mandanici*, 205 F.3d 519, 527 (2d Cir. 2000) (holding that *Teague* applied to *coram nobis* petitions).

of [habeas] cases on the basis of intervening changes in constitutional interpretation.”<sup>259</sup>

Not only is the *scope* of cognizable issues broad, but a constitutional violation would, in First Circuit Judge Torruella’s words, require “reexamination of practically all” judgments obtained in violation of a new rule.<sup>260</sup> This goes to the *nature* of habeas, and is precisely what generates the concern about floodgates, so much at the heart of the nonretroactivity analysis.

The nature of *audita querela*, however, is distinct. It already has a gatekeeping factor—the requirement for disproportionate, inequitable operation of an otherwise valid judgment. It does not need *Teague* to keep the thousands of prisoners from clogging up the dockets; only those few petitioners who can meet the level of a solid equitable claim can obtain relief.<sup>261</sup>

Second, the other, central prudential reason underpinning *Teague* does not apply to petitions for *audita querela*, namely that “without finality, the criminal law is deprived of much of its deterrent effect.”<sup>262</sup> Notably, *audita querela* does not technically demand as a remedy the vacatur of judgment; it does not demand that the prisoner be released; it does not demand expungement of the petitioner’s criminal record. It merely demands that the court do that which is within its jurisdiction to do to rectify the inequitable operation of a judgment, in light of an intervening change of law. This *might* include vacatur, release, or expungement, but does not necessarily include one or any of them. *Audita querela* does not, therefore implicate, to the same degree as habeas, the “finality” of judgment, and thereby its “deterrent” effect.

Finally, the Court has recently considered the “common law rule that respects the finality of judgments” in the context of *coram nobis*, another auxiliary writ of postconviction review.<sup>263</sup> *Coram nobis*, unlike *audita querela*, actually implicates the constitutionality of the judgment *at the time it was rendered*, with aspirations of pulling it up from its roots.<sup>264</sup> Nevertheless, the Court found that

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259. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring)).

260. *Cirilo-Muñoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005).

261. For more on this point, see *Kessack v. United States*, No. C05-1828Z, 2008 WL 189679, at \*6 (W.D. Wash. Jan. 18, 2008).

262. *Teague*, 489 U.S. at 309. See also *Mackey*, 401 U.S. at 691 (Harlan, J., concurring); Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970).

263. *United States v. Denedo*, 556 U.S. 904, 915–16 (2009).

264. See *United States v. Morgan*, 346 U.S. 502, 510 (1954).

“just as the rules of finality did not jurisdictionally bar the court in *Morgan* from examining its earlier judgment, neither does the principle of finality bar the [Navy-Marine Corps Court of Criminal Appeals] from doing so here.”<sup>265</sup> The only question was whether, in the context of the petition, “the facts of respondent’s case are insufficient to set aside the final judgment,” which turns on the *merits* of the case; indeed, Justice Kennedy wrote, “[t]he long-recognized authority of a court to protect the integrity of its judgments impels the conclusion that the finality rule is not so inflexible that it trumps each and every competing consideration.”<sup>266</sup>

*Teague*’s normative underpinnings—staying the tsunami of resentencing petitions at the floodgates, reinforcing finality’s deterrent effect, and presumptively protecting the integrity of convictions as rendered—do not apply to *audita querela*. The writ thus represents the outer limits of *Teague*’s domain.

### C. Separation of Powers

Respondents have argued since its resurgence in the early 1990s, and courts have often agreed as well, that issuing *audita querela* would violate the separation of powers.<sup>267</sup> This argument, too, is without merit. In the cases in which courts have recognized a constitutional problem in this regard, they have adjudicated petitions on “pure equity,” which *audita querela* is not. Historically, *audita querela* has necessitated some legal claim *in conjunction* with a showing of equitable harm; it is not fair to say that the writ would lie “when the court *dislikes* [a] collateral effect of [a] conviction.”<sup>268</sup> Courts have jurisdiction over such claims under the theory of “extended jurisdiction” discussed at length in Section II.B,<sup>269</sup> and the

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265. *Denedo*, 556 U.S. at 916.

266. *Id.*

267. *See, e.g.*, *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992) (“Creation of a new equitable remedy in the federal post-conviction relief scheme raises serious constitutional concerns. . . . We have a delicately balanced system—one that depends on a separation of powers.”); *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991) (expressing concern that a “pure equity” variant of *audita querela* would fail to “[respect] the legislative branch in defining the beneficiaries of its laws and of the executive branch in maintaining the integrity of convictions lawfully obtained”); *United States v. Reyes*, 945 F.2d 862, 866–67 (5th Cir. 1991) (“Such a novel remedy [that is, vacatur of a conviction on purely equitable grounds,] strains the traditional bounds of *audita querela* too far and presents separation-of-powers concerns.”); *United States v. Garcia-Hernandez*, 755 F. Supp. 232, 234–35 (C.D. Ill. 1991) (“The only possible inequity in these cases is the harsh consequences criminal convictions have under laws passed by Congress.”).

268. *Garcia-Hernandez*, 755 F. Supp. at 235.

269. *See United States v. Denedo*, 556 U.S. 904, 917 (2009).

Court has recently affirmed a sentencing court's "long-recognized authority . . . to protect the integrity of its earlier judgments."<sup>270</sup> If the writ is properly before the court, and it lies, it ought duly to issue; it is precisely this sort of judgment that is left to the judiciary. Furthermore, Congress has abolished *audita querela* on at least two occasions,<sup>271</sup> and thus clearly knows how to do it. The AEDPA does not mention a word about the All Writs Act and there is nothing in the U.S. Code to suggest that *audita querela* has been abolished. Any separation of powers concern is therefore exaggerated.

### CONCLUSION

Deputy Attorney General James M. Cole's speech seemed to suggest that the unforgiving operation of federal nonretroactivity renders executive clemency the *exclusive* remedy available to federal prisoners sentenced under the pre-*Booker* guidelines. This Note argues otherwise: some federal prisoners, whose sentences had equitable defects *even at the time*, and whose claims under §§ 2255 and 2241 are barred by nonretroactivity, should nonetheless be able to avail themselves of the new rule announced in *Booker*.

*Audita querela*'s history is complex, but its growth over the past three decades in federal court is illustrative, in the words of then-Judge Cardozo, of "the tendency of a principle to expand itself to the limits of its logic."<sup>272</sup> Whether in the context of medieval common law or Reconstruction, the passage of immigration reform or the reversal of the determinacy revolution in sentencing, *audita querela* gives litigants with especially equitable claims the opportunity to raise otherwise unavailable legal defenses. The rule in *Teague*, and its version in the successive motions provision of § 2255, apply precisely to those vehicles of postconviction review to which they were, and are, directed: habeas petitions and motions under § 2255, respectively. Because *audita querela* addresses a dis-

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270. *Id.* at 916. The Chief Justice's dissent on this point is instantly related to *Denedo*'s peculiar posture as an appeal from an Article I military tribunal. *See id.* at 918–19 (Roberts, C.J., concurring in part and dissenting in part). He concedes that the logic of the footnote in *Morgan*, upon which the Court's opinion rested, would apply to Article III courts, though he took issue with the question whether the footnote concerned jurisdiction or remedy. *Id.* at 921–22 (discussion *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954)).

271. 8 U.S.C. § 1252(b)(9) (2012) (repealing federal jurisdiction over removal orders under the All Writs Act); FED. R. CIV. P. 60(e) (abolishing "bills of review, bills in the nature of bills of review, and writs of *coram nobis*, *coram vobis*, and *audita querela*").

272. Benjamin Cardozo, Lecture II: The Methods of History, Tradition and Sociology (1920), *in* THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

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tinct wrong in a distinct way, it “may properly fill [an interstice] of the federal postconviction remedial framework.”<sup>273</sup> Thus the writ may serve as a last resort for those prisoners whose just claims for relief have gone unexamined because federal courts have failed to appreciate the remedy’s scope and the proper operation of federal nonretroactivity.

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273. *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir 1990).

